Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT FALANGA and RONALD CHALKER,

Petitioners,

vs.

STATE BAR OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether state bar rules can totally ban an attorney, under threat of disbarment, from conducting routine marketing and advertising, such as contacting business professionals or community leaders as referral sources, conducting public relation lunches or telephone solicitation, either done by the attorney individually, or by hiring marketing or public relations personnel, or would such rules be a violation of an attorney's constitutionally protected free speech rights.

II

Whether the challenged rules regulating the Georgia Bar are narrowly tailored time, place or manner restrictions which serve substantial government interests and do not violate the First Amendment to the United States Constitution.

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JURISDICTIONAL GROUNDS

This is a petition to review a decision of the United States Court of Appeals for the Eleventh Circuit entered on August 19, 1998. A timely Suggestion of Rehearing En Banc* was filed with the Court and was denied on November 18, 1998. This Petition for Writ of Certiorari is filed within ninety days of the Final Judgement. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are at issue in the instant cause:

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

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* "A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel." See Rule 35-6, FRAP with 11th Circuit, and also *Missouri v. Jenkins*, 495 U.S. 33, 110 S.Ct. 1651, 1662, 109 L.Ed.2d 31 (1990).

process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 12, Rules Regulating the Georgia Bar:

> A lawyer shall not solicit professional employment as a private practitioner for himself, his partner or associate through direct personal contact with a non-lawyer who has not sought his advice regarding employment of a lawyer.

RULE 13(b), Rules Regulating the Georgia Bar:

> (b) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client; except that he may pay for public communications permitted by Standard 5* and the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state. . . .

RULE 16, Rules Regulating the Georgia Bar:

> A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct by any person or organization prohibited under Standards 12, 13, 14 or 15.

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*Standard 5(a)(1)(2) and (3) provides "A lawyer shall not make any false, fraudulent, deceptive, or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (1) contains a material misrepresentation of fact or of law, or omits a fact necessary to make the statement considered as a whole not misleading; (2) is likely to create an unjustified expectation about the results that the lawyer can achieve; (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated".

RULE 17(a), Rules Regulating the Georgia Bar:

> A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except: (a) a lawyer may accept employment from a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

STATEMENT OF THE CASE

A 42 U.S.C. Section 1983 Declaratory Relief Petition was filed in the Atlanta Division of the United States District Court for the Northern District of Georgia on August 25, 1995 by Petitioners Robert A. Falanga and Ronald F. Chalker, licensed attorneys in the State of Georgia, who alleged that they desired to contact community leaders and business professionals, such as doctors and chiropractors, through the use of PR lunches to acquaint the business community with the legal services they had to offer for possible referrals of future clients in need of those types of legal services. Additionally, Falanga and Chalker desired to use target mailing to potential auto accident victims whose names were disclosed on police accident reports, and in some instances, to follow up the targeted mailing with a phone call (R1-11-2, 16-7). The State Bar of Georgia threatened prosecution for these types of activities desired to be performed and Petitioners contended that the prohibition from doing, or from hiring others such as public relations or marketing representatives to do so, was in violation of their constitutional rights.

The State Bar of Georgia answered the Petition and after a four day non-jury trial, on July 18, 1996, the District Court entered its Order declaring some of the challenged State Bar Rules constitutional but declared State Bar Rule 12, 16 (but only as it relates to Rule 12) and 17(a) as unconstitutional, enjoining the Georgia State Bar from enforcing those provisions as they applied to attorneys who solicit and encourage the institution of a judicial or administrative proceeding, or who offered assistance therein, before being consulted by a complainant in relation thereto, in a business context. The District Court ruled that although the State Bar's anecdotal evidence demonstrated certain harms that may be associated with in-person solicitation, the District Court found that the State Bar had failed to demonstrate that those harms were present in all circumstances. The District Court found that Rules 12, 16 (but only as it related to Rule 12) and 17(a) were substantially broader than necessary to prevent the alleged harms asserted by the State Bar and were therefore not a "reasonable fit" between the ends sought and the means used to obtain those ends.

The State Bar of Georgia appealed that decision to the Eleventh Circuit Court of Appeals and Petitioners cross-appealed. On August 19, 1998, the Circuit Court entered an opinion, in essence, declaring all of the State Bar Rules constitutional. Petitioners filed a timely Suggestion of Rehearing En Banc which was denied on November 18, 1998. This Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Petitioners challenge state bar regulations that as applied disbar attorneys who have routine business lunches with people in a position to refer clients. The

regulations as written prohibit in-person solicitation by attorneys or public relations and marketing representatives hired by the attorneys, from giving anything of value for a client referral. The State Bar of Georgia applies the regulation to prohibit attorneys from buying lunch (giving something of value for future referrals) and advising business, community and professional leaders of the kind of work the attorney does. Even if the attorney does not solicit the guest's business, the attorney faces disbarment, as applied under the Georgia State Bar Rules, if he accepts a referral from that guest.

Petitioners in this case are Georgia attorneys. They do not use newspaper, television or radio advertising to promote their business. They do not engage in face-to-face solicitation of potential clients. Instead, they network by letting business leaders and other professionals know about their practice through the use of routine PR lunches.

Sometimes, these business leaders and professionals refer clients who have asked them if they know of an attorney. Typically, the referring person will pass along the names of several attorneys, including the name of the petitioners. The inquiring person (potential client) is then free to follow up as he or she sees fit. There is typically no further involvement from the referring person and never any fee or renumeration paid for the referral (R7-521) (R9-549-550, 558-559).[1]

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[1] The bar association claims that the cost of lunch constitutes a renumeration or bribe to refer clients. However, the lunches occur before any clients are referred and there is no condition of referring clients on accepting the lunch invitation.

Further, there is never any actual solicitation of client referrals within a reasonable meaning of the term solicitation. There is never any mention of any particular client or any request that there be a referral of any particular client. Nor is there ever any communication with the guest "which directly or implicitly requests an immediate oral response from the recipient."[2] The luncheon guest simply hears about the attorney's background, his practice and is free to refer or not refer clients.[3] For instance, the State Bar Rules, as applied, prevent insurance defense lawyers from buying lunch or entertaining insurance companies; prevent real estate attorneys from buying lunch or entertaining realtors or mortgage companies; prevent estate lawyers from buying lunch or entertaining bankers; and prevent personal injury lawyers from buying lunch or entertaining doctors.

In the second aspect of this case, the petitioners desire to have employees review police reports at the Department of Public Safety and with the information

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[2] This is the operative portion of a definition for solicitation the court dealt with in *Edenfield v. Fane*, 507 U.S. 761, 764 (1993). Georgia does not define "solicitation" but this seems to be a definition that is consistent with the concerns this court has raised regarding in-person or face-to-face solicitation. Regardless of the definition, there is nothing on the records, in the District Court's Findings of Fact, or even in the State Bar of Georgia's brief to the Eleventh U.S. Circuit Court of Appeals to indicate that the petitioners ever initiated any uninvited in-person or face-to-face contact with potential clients.

[3] The majority of these luncheons result in few or no client referrals, but are still valuable in opening lines of communication between attorneys and professionals whose expertise or insights might be valuable in serving clients.

received, to mail letters and brochures to potential accident victims, which they occasionally follow up with a prepared script or a pre-recorded telephone call. For instance, instead of a prophylactic ban of this type of activity as applied by the State Bar, a rule or regulation could be more narrowly drawn similar to the precedents previously established by this Court regarding letter advertising. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

For instance, the State Bar could pre-approve the prepared script, e-mail message, or pre-recorded telephone call and could designate that it would only be about 30 seconds long, briefly explaining the person's legal rights and invite a call back. The State Bar could regulate that no telephone calls were to be placed for thirty days following a targeted personal injury incident. A regulated telephone call would not involve any direct human-to-human contact between the potential client and the attorney. The State Bar could regulate that the prepared script or pre-recorded tape could be played only once per potential client and that there would be no telephone calls after 9 p.m. Petitioners suggest this plan is very similar to the direct-mail advertising plan this court upheld in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988).

The State Bar association claims that the desired advertising and marketing plans by attorneys, such as Petitioners, violate its rules against in-person solicitation. The State Bar has stated that it will seek to disbar attorneys who engage in this kind of advertising and marketing solicitation. Even though there is no face-to-face solicitation of potential clients, the bar claims that this type of activity and networking constitutes such

egregiously unprofessional solicitation that the attorney should be banned from practicing law.

The State Bar of Georgia has both initiated and threatened to initiate disbarment proceedings against attorneys who engage in business lunches or informal meetings with community, business or professional people and attorneys who engage in any form of telephone communication with potential clients. This conduct by the State Bar of Georgia has chilled important First Amendment rights of attorneys.

The State Bar of Georgia offers two justifications for the way it applies this rule. The State Bar states that the way it applies this rule is necessary in order to avoid conflicts of interest and to protect the privacy of consumers and their families. Second, the State Bar argues it must apply this rule in the way it does to protect the reputation and standing of the legal profession.

The State Bar further argued that it has an interest in protecting consumers from conflicts of interest that may arise when community leaders and business professionals refer clients to attorneys. Without any evidence, the State Bar claimed that attorneys will subvert the interest of clients to the interest of the person making the referral. The State Bar claimed that the state has an interest in preventing conflicts of loyalty that come from referrals to attorneys. It claims its prohibition on attorneys meeting with business, community, and professional leaders advances this interest by inhibiting referrals.

The Eleventh Circuit decision, as opposed to the District Court decision, erroneously aligned the conduct desired to be performed by Petitioners as hereinabove described with the conduct prohibited by *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) as opposed to the

similar type of conduct approved in *Edenfield v. Fain*, 507 U.S. 761 (1993). Further direction from this Court is needed regarding the issues raised in this Petition regarding business practices of attorneys. The legal profession needs further direction from this Court regarding what type of attorney conduct can be regulated and what type of conduct is constitutionally protected free speech.

ARGUMENT FOR GRANTING THE WRIT

This case is a chance for the court to consolidate dichotomous precedents on attorney solicitation and advertising into one principled analysis that reflects competing policy concerns. The court has held written solicitation by attorneys is entitled to some First Amendment protection. The court has not extended First Amendment protection to personal-contact solicitation for profit. This case asks the court to decide, whether, where there is no chance of overreaching or fraud, personal solicitation by lawyers may merit First Amendment protection.[4]

Written solicitation enjoys substantial First Amendment protection. *Bates v. State Bar of Arizona*, 433 U.S. 350, (1977) held the First Amendment prohibited a state from banning an attorney's published price schedule. *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626 (1985) extended protection to an attorney's newspaper advertisement. *Ibanez v. Florida Department of*

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[4] The American Bar Association has called for an extensive re-evaluation of the solicitation rules especially in light of the computer age of new technologies. ABA White Paper, *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, July 1998.

Business and Professional Regulation, 512 U.S. 136, 114 S.Ct. 2084 (1994) held the state may not prohibit an attorney from truthfully advertising that she was a CPA and Certified Financial Planner. The court has repeatedly held the states may not ban truthful attorney advertising through the media.

Also, states may not prohibit attorneys from sending mail to potential clients. *In Re RMJ*, 455 U.S. 191 (1982) held Missouri could not prohibit an attorney from sending out a mass mailing containing his qualifications and area of expertise. *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988) invalidated a ban on targeted direct mail solicitations. *Peel v. Disciplinary Board*, 496 U.S. 91 (1990) held that a state may not prohibit an attorney from truthfully stating that he is a trial specialist. The court has protected both the manner and the content of written or printed attorney advertising.

The court has not extended First Amendment protection to personal oral solicitation. *Ohralik v. Ohio State Bar Association*, 436 U.S. 477 (1978) confronted an attorney's personal, and face-to-face solicitation of two young automobile accident victims who were recovering from injuries.[5] The court held that the "potential for overreaching is significantly greater when a lawyer, an advocate trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Id.* at 436 U.S. 464.

The court limited its holding to "the undisputed facts of (the) record". *Ohralik*, at 436 U.S. 447, 467 (1978). The narrow scope of *Ohralik* is clear in *pari materia* with *In Re*

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[5] Both solicitations were uninvited and one happened in a hospital room. 436 U.S. 447 (1978).

Primus, 436 U.S. 412 (1978). Justice Powell stated *Ohralik* stood only for the proposition that "the state may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences." *Id.* at 434. Thus, the policy concerns of overreaching and fraud bring a state's regulation within *Ohralik*.

Justice Marshall's *Ohralik* concurrence showed the court's decisions balance two policy goals. Solicitation bans "substantially impede the flow of important information" and discriminate against small firms. *Id.* at 473. However, the state had an interest in stopping "misrepresentation and overreaching". *Id.* at 469-470. All subsequent decisions balance these decisions.

Though *Ohralik* was limited to cases where there was actual danger of misrepresentation and overreaching, a myth developed. Commentators and bar associations pushed *Ohralik* further than this court intended.[6] The American Bar Association recommended broad restrictions on personal solicitation and subsequent decisions went far beyond *Ohralik*'s parameters.[7] In some eyes – though never in this court's holdings – *Ohralik* appeared to approve regulations banning all in-person solicitation.

The error appears clearly in *Edenfield v. Fane*, 507 U.S. 761 (1993). The court held an accountant soliciting clients

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[6] Paul Manning, *Ohralik v. Ohio State Bar Association, Do Bans on In Person Solicitation by Attorneys Make Sense*, Civil Rights Law Jour V. 3.2, p. 329 (1993). "In Ohralik, the attorney claims the State Bar's rule prohibiting in-person solicitation was unconstitutional as applied to the facts of his case. As such, one would imagine the *Ohralik* decision to have a very limited effect on the law of attorney advertising. This was Justice Marshall's view as expressed in his concurrence . . . " *Id.*

[7] *Id.*

in their office did not create potential misrepresentation or overreaching. Noting that solicitation: "[P]rovides an opportunity (for the buyer) to explore in detail the way in which a particular product or service compares to its alternatives in the market," the court held the First Amendment protects some forms of personal solicitation. *Id.* at 766.[8] Petitioners ask whether states may prohibit all oral communication regarding attorney's services and availability, even where there is little danger to consumers. Petitioners invite this court to balance the need to disseminate information against the dangers of overreaching and fraud.

Three policy goals support extending First Amendment protection to some attorney solicitation. The court has recognized the importance of free dissemination of price and service information. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).[9] The court has recognized the importance of free dissemination of information concerning an attorney's qualifications, background and areas of practice. *Peel v. Attorney Registration and Disciplinary*

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[8] The court stated: "In denying CPA's and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard.

[9] "Moreover, significant societal interests are served by such speech. Advertising though entirely commercial may carry information of import to significant issues of the day . . . And commercial speech serves to inform the public of the availability, nature, and price of products and services, and this performs an indispensable role in the allocation of resources in a free society." *Bates* at 433 U.S. 364 (1977).

Commission of Illinois, 496 U.S. 91 (1990)[10] *In Re RMJ*, 455 U.S. 191, 205 (1982).[11] Finally, there is commercial speech which vindicates "free trade in ideas" and legal rights. *In Re Primus*, 436 U.S. 412, 432 (1977).[12] So compelling are these concerns that "in recent years this court has not approved a blanket ban on commercial speech unless the speech itself was flawed in some way either because it was deceptive or related to unlawful activity," *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557 (1980).[13]

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[10] This case involved a challenge to a regulation that prohibited the petitioner from stating that he was a "Certified Trial Specialist" on his letterhead. The court held this was information that may be of use to the public. "The presumption favoring disclosure over concealment is fortified in this case by the separate presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients . . . Information about certification and specialties facilitates the consumer's access to legal services and this better serves the administration of justice." *Peel v. Attorney Disciplinary Committee of Illinois*, 496 U.S. at 110.

[11] The court held that the First Amendment would not permit state restrictions of an attorney's announcement and advertisement of his areas of practice, his membership in certain bars and the geographical areas of his practice. *Id.* at 455 U.S. 191, 196-199 (1982).

[12] "Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts. The First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights . . . including advising another that his legal rights have been infringed and referring him to a particular attorney or group of attorneys . . . for assistance." *Primus* at 436 U.S. 412, 432 (1978).

[13] The time period referred to in this 1980 decision would include the court's decision in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). Thus, the court apparently believed that the

Central Hudson Gas and Electric v. Public Service Commission, balanced these policy considerations through a four pronged test. "[W]e must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted and whether it is not more extensive than necessary to serve that interest."

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) the court stated: "Commercial speech that is not false, or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest . . . Our application of these principles to commercial speech has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible . . . but that rules prohibiting in person solicitation of clients by attorneys are, at least under some circumstances, permissible . . . It is apparent that the concerns that moved the Court in *Ohralik* are not present here . . . [A]ppellant's advertisement – and print advertising generally – poses much less risk of overreaching or undue influence." *Zauderer*, 471 U.S. 626, 642-43

Ohralik case involved speech that was "flawed in some way either because it was deceptive or related to unlawful activities."

(1985).[14] "Accordingly the **substantial interests** that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant . . . " *Id.* (emphasis added).

The court's analysis turns on the likelihood of overreaching, not pigeon holing the method of communication. The court found overreaching in the facts of *Ohralik*. However, where the circumstances do not indicate a high chance of overreaching or misleading, the state has no substantial interest at least as compared to the public interest in the free flow of information.

The balance of policy concerns in the *Central Hudson* format justifies invalidating the bar's regulations as applied. All of the policy concerns justifying protecting commercial speech are present. None of the concerns of overreaching that concerned the court in *Ohralik* are here. The state regulations preventing the petitioners' conduct violate the First Amendment.

In the present case, the petitioners seek to spread important truthful information to persons who may have legal problems. Petitioners want professional, business, and community leaders to know about the services they perform. This is not to solicit the leaders' business or a

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[14] The court added: "Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and exercise of the choice on the part of the legal consumer than is personal solicitation by an attorney." *Id.* at 471 U.S. 626, 642 (1985).

particular case. It is so that if anyone asks the leader for an attorney referral, the leader will know about the petitioners and can let the person consider them along with other attorneys.

The information the petitioners want to spread is the kind of information the First Amendment protects. Petitioners want people to have information concerning their background and qualifications. This court has held in *Ibanez*, *RMJ*, and *Peel* that this is important information for consumers to have. This is information that deserves First Amendment protection.

The petitioners also want potential clients to have information about the costs of their services. The cost of legal representation is an important issue with many clients and often keeps them from inquiring about legal services.[15] In *Bates*, the polestar case in attorney solicitation disputes, this court held that truthful and non-misleading information concerning fee rates deserves First Amendment protection. Likewise important is information concerning the attorney's background, qualifications, and areas of practice. Before deciding whether to recommend an attorney it is appropriate for a person to know something about the attorney. The information petitioners are imparting in this case deserves First

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[15] *See, e.g.*, Jeffrey Kinsler, *Targeted Direct Mail Solicitation: Shapero v. Kentucky Bar Association Under Attack*, 25 Loyola University Chicago L. Rev. 1 (1993). "The vast majority of the public exhibits an alarming ignorance about the law and its impact on their lives. People avoid consulting a lawyer even when they need to do so. This tendency stems largely from two factors: the feared price of the attorney's services and an inability to locate competent counsel." *Id.*

Amendment protections against the bar association's as applied restriction.

None of the concerns that motivated the court in *Ohralik* exist in this case. There is no personal solicitation of vulnerable accident victims and no question of attempting to have people sign contracts when they are in the hospital or recovering. There are no high pressure tactics by an advocate. This is simply giving useful information in a low-cost manner to a buffer person who may pass the information along.

There is no "solicitation". While the Georgia Bar never defines solicitation, most definitions and the court's cases reflect a concern over an advocate demanding an "immediate oral response".[16] Another definition focuses on: "a direct appeal targeting a potential client."[17] Here, there is no communication requiring an immediate oral response and in the case of business lunches, no direct appeal targeting a potential client.

This distinguishes *Ohralik*. There simply is no solicitation of accident victims within any previously accepted definition of the term. The communication requires no

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[16] *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 764 (1993) the court quoted from the definition of solicitation in Fla. Admin. Code Sec. 21A-24.002(2)(c). In addition the *Ohralik* court's concern with solicitation focused on the immediate response. "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v. Ohio State Bar*, 436 U.S. 447, 457 (1977).

[17] Brian J. King, Note, *Ambulance Chasing Accountants In Person Solicitation and the Professions*, 34 B.C. L. Rev. 561, 562 (1993).

immediate response. This chance for cool reflection distinguishes *Ohralik*.

Also, the circumstances surrounding the speech are inapposite from *Ohralik*. In *Ohralik*, the attorney went to the hospital room and the homes of accident victims. Here, the attorney is not visiting any accident victim, but meeting with sophisticated community, business, and professional leaders in a low-key environment. These differing circumstances distinguish this case from the pressure tactics of *Ohralik*. Finally, there is no question of using high-pressure tactics to sign a contract.

Regarding routine business lunches, the policy concerns side with granting First Amendment protection. These meetings foster socially valuable communication. They do not promote fraud, overreaching, or high pressure sales tactics against vulnerable accident victims. The business lunches are the furthest thing from "ambulance chasing".

Likewise, the proposed telephone solicitations deserve First Amendment protection. The petitioners' only purpose is to deliver useful information from either a prepared script or from an audiotape. They will not personally visit any client who does not invite them and will not insist on an immediate response. The bar association can listen to a copy of a proposed marketing tape or review the script to make certain there is no abuse.

The *Central Hudson* test cuts against the bar association's unique application of these rules. The State Bar does not have a substantial interest in prohibiting the conduct it attacks and its application will not materially advance its interests. The proposed application of the bar rules is not a "fit" for the evil the state alleges it wishes to remedy.

The State Bar asserts two interests for banning routine business lunches between attorneys and professional, community, and business leaders. It states that such lunches may promote conflicts of loyalty. Further, it claims such lunches may invade privacy and lower the public's regard for lawyers. Logic and evidence contradict both.

The bar's assertion that the state has an interest in curbing conflicts of loyalty caused by referrals is more than disingenuous. The state legislature in 1996 has ***specifically rejected*** a proposed law to prohibit chiropractors from referring cases to attorneys. The legislature decided Georgia had no interest in stopping conjectural, speculative conflicts of loyalty that might come from persons referring clients to attorneys. As the state's supreme policy making body has eschewed this interest, the bar cannot claim it for the state.

Also, there is no evidence that referrals breed conflicts of interest. The bar association presented no evidence that referrals create conflicts of interest. This court has held that the government's burden: "is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction of commercial speech must demonstrate that the harms it recites are real and its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 115 S.Ct. 2371, 2377 (1995). Therefore, unless the bar association presents some evidence that referrals create conflicts of loyalty, it shows no substantial interest.

The bar association itself has eschewed this interest. The bar makes referrals and licenses referral agencies. Many of the agencies make referrals for fees. Thus, the

bar has endorsed the concept of selling clients to attorneys who can afford them.

This conduct by the bar is far more likely to engender conflicts of loyalty than the conduct of the petitioners. The bar association's program bases referrals on who can pay. The attorney can give the client good service or poor service and still get additional business by paying more. Conversely, in the petitioner's version of referrals, business, professional, and community leaders make referrals of their constituents, clients, or associates because they hope these persons will be well served and appreciative. The attorney who poorly serves the referred client not only loses the confidence of the client, but the confidence of the referring person. An attorney will work hard to give good service to a referred client so that his services are appreciated by the client and the referral source. The bar association's version of client referrals may well put the potential client last, but the petitioner's plan is designed to promote the client's interests.

Because this regulation is paternalistic, the court should evaluate the bar with "special care". This court has held that: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good," *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495, 1508 (1996). "Special concerns arise from regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Id.* at 116 S.Ct. 1495, 1506 (1996).

Here, the bar association wants to keep people "in the dark" for their own good. The bar association doesn't want the public to be able to check the qualifications of attorneys with community, business, and professional

leaders. Rather, it wants to force all persons seeking a referral to an attorney to use the bar approved system which sells the potential client's legal problem to the highest bidder.[18]

The second prong of the *Central Hudson* test presents similar but more severe problems for the bar association's application of its rules. The state must show its restriction directly and materially advances the goal. The bar argues prohibiting business lunches will curb referrals which will then curb conflict of loyalty problems. This involves two unproven predicates.

This court has held: "First the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, at 447 U.S. 557, 564 (1980). Moreover, as the state asserts the validity of the regulation it must present evidence to justify its position. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983). Recently, as noted above, the court held: "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

The proposed application of the regulations cannot pass either requirement. This is at best a remote attack of

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[18] This court was prophetic when it wrote: "Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond irrationally to the truth." 44 *Liquormart*, 116 S.Ct. 1495, 1508.

a speculative problem. The bar says restricting business lunches will cut down on the number of referrals. It then posits that cutting down on referrals will materially impact the problems with conflicts of loyalty to clients. A chain is only as strong as its weakest link and in this case both links are so weak as to be non-existent.

The bar's assumption that banning business lunches will stop referrals is illogical. Even if attorneys do not take business, community, or professional leaders to lunch the associates, constituents and clients of those persons will still need attorneys. Those persons needing attorneys will still ask for names of attorneys from persons whose status, experience, and judgment they respect. The only difference is that the person making the referral will have less information upon which to base his referral. Not only does the bar association lack a substantial interest to justify its application of the bar rules, but that even if there were a substantial interest, the bars application of the rules would not advance its alleged agenda. Facts indicate that the state has no substantial interest in cutting down conflicts of loyalty generated by referrals. Moreover, the bar's restriction would cut down on neither referrals or conflicts of loyalty. The bar's application of the regulations fails two of the *Central Hudson* prongs.

The bar's restriction also is not narrowly tailored to the end it supposedly seeks. Under *Central Hudson* at 565 the court held the state must show its restriction is "not more extensive than necessary to serve that interest". Later, in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) the court stated that this prong of the test requires "a fit between the legislature's ends and the means chosen to accomplish those ends".

The State Bar's restriction is one of the worst "fits" imaginable. The restriction does not "fit" because it does not serve the bar association's alleged goal, but does prohibit conduct unrelated to that goal. Restricting business lunches will not stop referrals or conflicts of interest. It will merely inhibit socially useful speech and force people to make referrals with less information. This does not at all fit the bar association's purported goal. There is a far less intrusive means to this end. The bar association already has distinct rules prohibiting attorneys from becoming involved in cases where their loyalties might be divided. This restriction vindicates the state's goal without restricting free speech. The state has shown no evidence that the rules against conflicts of loyalty are ineffective.

In summary, the as applied regulations of the bar association fail three critical prongs of the *Central Hudson* test. The as applied restrictions do not serve substantial interests. They do not materially advance any substantial state interest or even the alleged state interest. The restriction does not fit the state's alleged objective. The restrictions on business lunches neither advance the state's goal of cutting down conflicts of interest or vindicate any policy considerations of restricting attorney soliciting. They positively damage the flow of important and useful information.

The Petitioners also wish to send letters to accident victims and occasionally follow up with a telephone call or electronic e-mail message. The State Bar of Georgia has a blanket prohibition of telephone solicitation. The prohibition has no limits. Petitioners may never solicit over the telephone.

This court has held that commercial speech has First Amendment protection. *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). The court has held that for a regulation on commercial speech to stand, it must involve a substantial state interest, directly and materially advance the state interest, and be narrowly tailored to advance that state interest. *Central Hudson*, 447 U.S. 557 (1980). Later, this court held that the "narrowly tailored" test requires "a fit" between the state's goal and the regulation. *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371 (1995).

In the case of *Florida Bar v. Went For It, Inc.*, the court cited privacy concerns to uphold a ban on mail solicitation to accident victims. A 30-day limit on the ban made it narrowly tailored. These concerns overrode objections the ban kept victims from learning of their legal rights when insurance adjusters and defense counsel might be "clamoring for the victim's attention", *Went For It*, at 115 S.Ct. 2380. "Respondent's second point would have force if the Bar's rule were not limited to a brief period . . . " *Id.* In Petitioner's case, the bar's rule is eternal. The regulation lets adjusters and defense lawyers pester accident victims at any time. The rule does not "fit" the state's interest in protecting victim privacy. The First Amendment permits attorneys to direct letters to potential clients facing certain legal problems. The court held a letter reader can "effectively avoid further bombardment of his sensibilities simply by averting his eyes." Telephone solicitation is similar. The person getting the call can simply hang up the telephone.

The telephone solicitation is unlike the face-to-face solicitation. The attorney will not be with the potential client. There will be an automatic cooling-off period before signing of any papers. There is no requirement for an immediate response. The Petitioners' conduct does not

raise other concerns like those in *Ohralik*. There, face-to-face solicitation invited fraud and overreaching. It was difficult to police. Neither concern applies here; there is no personal solicitation and the bar can easily review the scripted conversation or tape.

The fact that there is no face-to-face solicitation distinguishes this case from *Ohralik* and brings it closer to *Shapero*, 486 U.S. 466 (1988). There, the court invalidated a prohibition on direct mail advertising targeted to persons with specific legal problems. The court held: "The mode of communication makes all the difference . . . unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the reader of an advertisement can effectively avoid further bombardment of his sensibilities by simply averting his eyes." *Id.* at 466. So it is here. There is no "badgering advocate", only a scripted or recorded telephone call. Offended persons can simply hang up. The message does not require an immediate answer, it simply invites a call to the attorney.

With specific reference to *Central Hudson*, the restriction fails the third and fourth prongs of the test. It does not materially advance the State's goal of protecting privacy and helping the bar's reputation. It is not sufficiently narrowly tailored to produce a "fit" with the supposed goal. The proposed regulation will stop socially valuable communication without advancing the goals of the bar association.

The State Bar also argues that its restrictions protect privacy and enhance the public's view of the bar. These justifications fail the second, third and fourth prongs of the test. The bar does not show a substantial state interest. The bar has not shown the restrictions "directly and

materially" advance its alleged interest and has not shown that they are a reasonable or good "fit" to the interest asserted.

The mere fact that a person might be offended or feel their privacy was invaded by the speech is not a substantial governmental interest justifying a restriction on commercial speech. In *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983) the court invalidated a regulation that prohibited unsolicited mailing of advertisements for contraceptives. The government argued that many recipients would find the mailing intrusive. The court held that even if it was true, it did not save the regulation. "The First Amendment does not permit the government to prohibit speech as intrusive unless the captive audience cannot avoid the objectionable speech."

Similarly, in *Carey v. Population Services International*, 431 U.S. 678, 700-701 (1977), this court invalidated a state ban on contraceptive advertising. The court decided New York's asserted interest in protecting the public from "offensive" material is not substantial enough to restrict speech. The court stated offensiveness is "classically not a justification validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 431 U.S. 701.

The privacy issue here is different from the privacy issue in *Florida Bar v. Went For It, supra.* Here, the bar rule continues for eternity. In *Went For It*, the privacy concern revolved around contacting victims who were still recovering or family members still grieving. The bar is not asserting interests that justify restricting free speech. It does not assert the overreaching that justified restrictions

on face-to-face solicitation in *Ohralik*. *Ohralik* will not happen here. There was and will not be face-to-face solicitation of any accident victim, visits to a hospital, or attempts to have an accident victim sign a contract in a time of vulnerability. Nothing shows any conduct similar to *Ohralik* and the State Bar has not alleged any face-to-face solicitation.

The applied rule fails the second prong of the *Central Hudson* test. The state must show "the harms . . . are real and its restriction will in fact alleviate them to a material degree", *Edenfield* at 771. "This burden is not satisfied by mere speculation or conjecture". The state shows no evidence people will think less of attorneys because they spread information concerning legal rights. Many people need attorneys to distribute information about the availability of their services, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The regulation as applied does not directly or materially advance the bar's purported interests. The regulation as applied is not a good "fit" to advance the state's interests. It needlessly restricts speech unrelated to the state's purported interests and permits conduct that harms the state's purported interests. The regulation as applied protects nobody's privacy because it does not prohibit insurance adjusters and defense attorneys from soliciting accident victims and their families. It will not protect the victim's privacy. It prevents accident victims from hearing from an attorney who may help. Victims will not get even a short, recorded message about legal rights. This will make it harder for accident victims to find an attorney and easier for defense lawyers and adjusters to take advantage.[19]

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[19] Jeffrey S. Kinsler, *Targeted Direct Mail Solicitation: Shapero v. Kentucky Bar Association Under Attack*, 25 Loyola Chi. L. Rev. 1

In *Florida Bar v. Went For It*, 115 S.Ct. 2371 (1995) the court noted the problem of lawyers not being able to tell victims their rights while "opposing counsel and insurance adjusters may be clamoring for victims' attention". *Id.* at 2380. In *Went For It*, the court held the temporal nature of the limit saved the regulation. However, here there is no time restriction. Insurance adjusters and defense counsel may solicit freely, but victims will not learn about thier rights. This ban will not protect other categories of legal consumers privacy. The bar association's ban only affects attorneys. The bar association's own publication predicts accounting firms soon will be the major providers of legal services to business.[20] The ABA has noted the differing professionalism regulations governing accountants and lawyers.[21] Accounting firms will solicit while attorneys may not. This does not protect privacy, but handicaps attorneys in delivering legal services.[22]

(1993). The author notes that many people tend to not consult an attorney even when they know they need one. This comes from fear of the price and an inability to find competent counsel. Permitting attorneys to spread information about their services would address both of these problems.

[20] Gregory Smith, *A Little Off The Top, Accounting Firms Edge Into the Legal Market*, October 1998 Georgia State Bar Journal, Vol. 4 No. 2 p. 10: "A tidal wave of change is on the horizon, and if we do not prepare we may lose our independence . . . "

[21] John Gibeaut, *Its a New Game*, ABA Journal, February 1998, p. 42. Discussing the way in which accounting firms now provide many services that were formerly reserved for attorneys.

[22] Of course, this may be problematic for business consumers since accountants are held to a much lower conflict of interest standard. It is common for the same accounting firm

Nor will this ban enhance the profession's reputation. This rule complicates ordinary people's search for a lawyer but does not prevent insurance companies or defense lawyers from hectoring injured victims. Ordinary people may correctly conclude the State Bar is against them and consider lawyers their enemy.[23] This court has held that to be a "fit" the rule may not "burden substantially more speech than is necessary to further the governments legitimate interests", *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746 (1989). "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals". *Id.*

The State Bar is doing what this court has prohibited. The regulation bans more speech than necessary. It goes further than personal solicitations of specific accident victims or families who may be grieving or under stress. It snares useful and appropriate speech. Nor is the ban limited to accident victims. The State Bar will enforce this standard to business clients and sophisticated people not amenable to high pressure tactics. The rules ban speech telling people about attorney credentials in the market of legal services.

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to represent both sides of a corporate merger. As accountants compete more successfully for legal business, it will be more common for accounting firms to represent the legal interests of opposing sides of some transaction – an idea that is an anthem to lawyers.

[23] See Casenote, *Ivory Tower Paternalism and Lawyer Advertising: The Case of Florida Bar v. Went For It, Inc.*, 40 St. Louis University L.J. 895 (1996). The author suggests that restricting lawyer speech might increase consumer mistrust thereby reinforcing current negative impressions.

In summary, totally banning routine business lunches and telephone marketing is an impermissible prior restraint on free speech. These bans do not further any substantial government interest and postively interfere with important societal goals. The restrictions are too broad and snare useful and productive speech. Society has been catapulted into the computer age of electronic communication. Targeted telemarketing, like targeted e-mail marketing in the field of lawyer advertising and solicitation needs to be addressed. The law profession needs direction from this court regarding the types of conduct that can be regulated as opposed to the types of conduct which is protected by free speech.

CONCLUSION

For the reasons stated above, the Court should grant certiorari and hear the important issues that this case raises.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 96-8972 & 96-9491

D.C. Docket No. 1:95-CV-2160-GET

ROBERT FALANGA, Individually and
RONALD F. CHALKER, Individually,

Plaintiffs-Appellees, Cross-Appellants,

versus

STATE BAR OF GEORGIA,

Defendant-Appellant, Cross-Appellee.

No. 97-8062

D.C. Docket No. 1:95-CV-2160-GET
ROBERT FALANGA, Individually;
RONALD F. CHALKER, Individually, et al.

Plaintiffs-Appellants,

versus

STATE BAR OF GEORGIA,

Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(August 19, 1998)

Before HATCHETT, Chief Judge, EDMONDSON and COX, Circuit Judges.

HATCHETT, Chief Judge:

The principal issue in this case is whether Georgia's prohibiting lawyers and their agents from soliciting professional employment from potential clients face-to-face and without invitation survives First Amendment commercial speech scrutiny as applied to appellees/cross-appellants. We conclude that it does, affirming in part and reversing in part the judgment of the district court.

I. BACKGROUND

Appellees/cross-appellants Robert Falanga and Ronald Chalker, who are licensed to practice law in and members of the State Bar of Georgia, primarily represent plaintiffs pursuing personal injury and wrongful death claims arising out of automobile accidents. Falanga and Chalker serve as the only lawyers in their five-office law firm headquartered in Atlanta. Most of their clients are poor and uneducated. Falanga and Chalker retain new clients through in-person, telephone and direct mail solicitation. They obtain the names of potential clients in two principal ways. First, the law firm's "public relations" agent asks doctors and chiropractors to recommend Falanga and Chalker to injured patients and grieving family members in need of legal services. In return, Falanga and Chalker treat the doctors and chiropractors to lunch and provide free legal advice. Additionally, law firm employees sift through police reports at the Department of Safety. With this information, Falanga and Chalker

mail approximately 300 letters and brochures per week to accident victims.

In June 1992, upon receiving a sworn grievance from a chiropractor, the State Bar of Georgia began investigating Falanga and Chalker for breaches of several professional conduct standards. Ultimately, the State Bar "credibl[y] threat[ened] [to] prosecut[e]" Falanga and Chalker for violating Standards 5(a)(2), 5(a)(3), 6(b), 7(a), 8, 12, 13, 16, 17(a) and 18 of Rule 4-102. *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998).[1] To stop

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[1] The State Bar does not challenge Falanga's and Chalker's individual or collective standing to bring this lawsuit. Nevertheless, we have combed the record to satisfy our "independent obligation to consider standing[.]" Jacobs v. Florida Bar, 50 F.3d 901, 904 n.12 (11th Cir. 1995); *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (the existence of standing "must be supported adequately by the evidence adduced at trial") (internal quotation marks and citations omitted). In investigatory correspondence with Falanga and Chalker, the State Bar specifically referenced all but Standards 7(a), 17(a) and 18. These three standards, however, closely relate to the ones that the State Bar specifically referenced. As such, a "credible threat of prosecution" looms over Falanga and Chalker as to all ten provisions. *Jacobs*, 50 F.3d at 904 (a lawyer possesses standing to challenge the constitutionality of rules of professional responsibility if the lawyer shows "that either (1) he [or she] was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution") (internal quotation marks and citations omitted). Additionally, Falanga and Chalker testified that they intend to engage in conduct that these standards prohibit. *See* Texans Against Censorship, Inc. v. State Bar of Tex., 888 F.Supp. 1328, 1340 (E.D.Tex.1995) (dismissing lawyers' constitutional challenges because they expressed no "credible intention of engaging in conduct that would be proscribed by" certain rules of conduct), *aff'd*, 100 F.3d 953 (5th Cir. 1996).

disciplinary proceedings, Falanga and Chalker filed a complaint in the United States District Court for the Northern District of Georgia. Pursuant to 42 U.S.C. § 1983, Falanga and Chalker alleged, among other things, that enforcement of these standards would violate their commercial speech rights under the First Amendment, as incorporated through the Fourteenth Amendment.[2] After conducting a non-jury trial, the district court sustained as constitutional all but the restrictions on lawyers' in-person, uninvited solicitation, Standards 12, 16 (only as it relates to 12) and 17(a).[3] Declaring these three standards

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[2] Prior to trial, the parties signed a written agreement that the State Bar would not prosecute Falanga or Chalker until the district court resolved the lawsuit. They also agreed to substitute a nominal plaintiff, Ralph Goldberg, to challenge the standards that Falanga and Chalker faced formal charges for violating. (Goldberg is not a party to this appeal.) The district court accepted this agreement and declined to abstain from deciding the case. *See* Younger v. Harris, 401 U.S. 37, 53 (1971). No party takes issue with the district court's action. Because it appears that "*Younger* abstention is *not* jurisdictional," we assume without deciding that the district court properly accepted the agreement not to abstain. Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994).

[3] The district court rejected Falanga's and Chalker's contentions that the standards were impermissibly vague, the standards' disparate treatment of personal injury lawyers ran afoul of the Equal Protection Clause, and the State Bar's application of its rule of procedure violated their procedural due process rights. Falanga and Chalker do not cross-appeal the equal protection and due process rulings. They do, however, "maintain that most, if not all, of the rules are so vague that they cannot pass first [sic] Amendment muster." Answer/Initial Cross-Appeal Brief at 15. We reject this cursory contention as meritless. *See Wilson*, 132 F.3d at 1430 (rules are not impermissibly vague if lawyers "can derive a core meaning from" them).

unconstitutional, the court enjoined the State Bar from enforcing them against any lawyer.

II. DISCUSSION

In part A, we discuss whether Standards 12, 13, 16 and 17(a) – prophylactic bans on lawyers' and their agents' in-person, uninvited solicitation – are constitutional as applied to Falanga and Chalker.[4] In part B, we address the constitutionality of the standards on lawyers' advertising that the district court upheld – Standards 5(a)(2), 5(a)(3), 6(b), 7(a), 8 and 18. Where, as here, the parties to a First Amendment case dispute only the district court's findings of constitutional (as opposed to historical) fact, our standard of review is de novo. *See Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) ("In cases involving first amendment claims, an appellate court must make an independent examination of the whole record. . . . [A]n appellate court is not bound by the 'clearly erroneous' standard of

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[4] The parties do not dispute that all of Falanga's and Chalker's constitutional claims are as-applied ones, even though portions of the record indicate that they challenged the standards on their face. *E.g.*, Answers to Interrogatories at 5 (The State Bar "has promulgated, maintained and now sought to enforce, Professional Standards which are *facially* violative of the First Amendment of the Constitution of the United States.") (emphasis added). Wisely, Falanga and Chalker abandoned their facial challenges, perhaps realizing that "when a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied." *Jacobs*, 50 F.3d at 906 n.20. To be sure, Falanga and Chalker "seek to vindicate their own rights," not the rights of all Georgia lawyers. *Jacobs*, 50 F.3d at 906.

review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary.") (citations omitted), *cert. denied*, 485 U.S. 981 (1988).

A.

All 50 states and the District of Columbia regulate lawyers' and their agents' in-person solicitation of professional employment.[5] Georgia is no

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[5] *See* Alabama Rules of Ct., R. Prof. Conduct 7.3(a) (West 1998); Alaska Ct. Rules, R. Prof. Conduct 7.3 (West 1997); Ariz. Rev. Stat. Ann., Supreme Ct. R. 42, ER 7.3 (1998); Arkansas Rules of Ct., Model R. Prof. Conduct 7.3 (West 1998); Cal. Bus. & Prof.Code, R. Prof. Conduct for the State Bar 1-400(C) (West 1998); Colo. Rev. Stat. Ann., R. Prof. Conduct 7.3 (West 1998); Connecticut Rules of Ct., Rules of Professional Conduct 7.3(a) (West 1997); Delaware Rules of Ct., Lawyers' R. Prof. Conduct 7.3 (West 1997); District of Columbia Rules of Ct., Rules Governing the Bar app. A, R. Prof. Conduct 7.1(b)-(d) (West 1998); R. Reg. Fla. Bar 4-7.4 (1998); Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standards 12, 13, 17 (Michie 1998); Hawai'i Ct. Rules, Rules of the Supreme Ct., Ex. A, R. Prof. Conduct 7.3 (West 1997); Idaho Rules of Ct., R. Prof. Conduct 7.3 (West 1997); Ill.Ann.Stat., Supreme Ct. Rules, R. Prof. Conduct 7.3 (Smith-Hurd 1998); Ind.Code Ann., R. Prof. Conduct 7.3 (West 1998); Iowa Code Ann. tit. XV, subtit. 2, ch. 602 app., Code Prof. Resp. for Lawyers, DR 2-101(B)(4)(a) (West 1998); Kansas Ct. Rules & Procedure, Supreme Ct. R. 226, Model R. Prof. Conduct 7.3 (West 1997); Ky.Rev.Stat. Ann., Supreme Ct. R. 3.130, R. Prof. Conduct 7.30 (Baldwin 1998); La.Rev.Stat. Ann., Articles of Incorp. of the State Bar Ass'n, art. XVI, R. Prof. Conduct 7.2 (West 1998); Maine Rules of Ct., Bar Rules, Code Prof. Resp., Rule 3.9(f) (West 1997); Maryland Rules of Ct., R. Proced. 16-812, R. Prof. Conduct 7.3 (West 1998); Massachusetts Rules of Ct.,

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Supreme Judicial Ct. R. 3:07, R. Prof. Conduct 7.3 (West 1998); Michigan Rules of Ct., R. Prof. Conduct 7.3 (West 1998); Minn.Stat. Ann., R. Prof. Conduct 7.3 (West 1997); Mississippi Rules of Ct., R. Prof. Conduct 7.3 (West 1997); Missouri Ct. Rules, Supreme Ct. R. 4, R. Prof. Conduct 4-7.3 (West 1998); Montana Rules of Ct., R. Prof. Conduct 7.3 (West 1997); Nebraska Ct. Rules & Procedure, Rules of the Supreme Ct./Ct. of Appeals, Code Prof. Resp., DR 2-104 (West 1998); Nev.Rev.Stat., Supreme Ct. Rules, R. Prof. Conduct 197 (1997); N.H. Stat. Ann., R. Prof. Conduct 7.3 (1997); New Jersey Rules of Ct., R. Prof. Conduct 7.3 (West 1997); New Mexico R. of Ct., R. Prof. Conduct 16-703 (West 1998); N.Y. Jud. Law app., Code Prof. Resp., DR 2-103(A), DR 2-104(A)-(C) (McKinney 1997); North Carolina Rules of Ct., State Bar Rules, Rev. R. Prof. Conduct 7.3 (West 1997); North Dakota Ct. Rules, R. Prof. Conduct 7.1 (West 1998); Ohio Rev.Code Ann., Code Prof. Resp., DR 2-103(A), DR 2-104(A) (Baldwin 1998); Okla. Stat. Ann. tit. 5, R. Prof. Conduct 7.3 (West 1998); Oregon Rules of Ct., Code Prof. Resp., DR 2-104 (West 1998); 42 Pa. Cons.Stat. Ann., R. Prof. Conduct 7.3 (1998); Rhode Island Rules of Ct., Supreme Ct. Rules, art. V, R. Prof. Conduct 7.3 (West 1998); S.C. Code Ann., Appellate Ct. Rule 407, R. Prof. Conduct 7.3 (Law. Co-op. 1997); S.D. Codified Laws Ann. tit. 16, chs. 16-18 app., R. Prof. Conduct 7.3 (1997); Tennessee Rules of Ct., Supreme Ct. R. 8, Code Prof. Resp., DR 2-104 (West 1997); Tex. Gov't Code Ann. tit. 2, subtit. Gapp. A, art. X, § 9, Disciplinary R. Prof. Conduct 7.03 (West 1998); Utah Rules of Ct., Supreme Ct. Rules of Prof. Practice, R. Prof. Conduct 7.3 (West 1998); Vermont Rules of Ct., Code Prof. Resp., DR-2-104 (West 1998); Virginia Rules of Ct., Supreme Ct. Rules, part 6, § 2, Code Prof. Resp., DR 2-103(A), (F) (West 1997); Washington Ct. Rules, R. Prof. Conduct 7.3 (West 1997); West Virginia Rules of Ct., R. Prof. Conduct 7.3 (West 1997); Wis. Stat. Ann., Supreme Ct. Rules, ch. 20, R. Prof. Conduct 7.3 (West 1998); Wyoming Rules of Ct., R. Prof. Conduct for Att'ys at Law 7.3(a) (West 1997).

exception.[6] It prohibits lawyers from engaging in in-person, uninvited solicitation:

> A lawyer shall not solicit professional employment as a private practitioner for himself, his partner or associate, through direct personal contact with a non-lawyer who has not sought his advice regarding employment of a lawyer.

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 12 (Michie 1998).[7] Similarly, lawyers may not solicit through an agent or pay for unregulated referrals:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client;

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[6] The Supreme Court of Georgia possesses authority "to regulate and govern the practice of law" in the state. O.C.G.A. § 15-19-31 (Michie 1994). Pursuant to legislative permission, the supreme court established "as an administrative arm of the court a unified self-governing bar association . . . known as the 'State Bar of Georgia,' composed of all persons licensed to practice law" in the state. O.C.G.A. § 15-19-30. The State Bar recommends standards of lawyer conduct, but they do not become binding on lawyers until the supreme court adopts them. *See* O.C.G.A. § 15-19-31.

[7] Throughout this opinion, we quote only those portions of the standards that Falanga and Chalker constitutionally challenged.

State authorities may punish a lawyer who violates Standard 12 with any level of discipline up to and including disbarment. *See* Standard 12; Rule 4-102(b).

except that he may pay for public communications permitted by Standard 5 and the usual and reasonable fees or dues charged by a bona fide lawyer referral system. . . .

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 13 (Michie 1998).[8] Finally, Georgia prohibits lawyers from retaining "strangers" to whom they or their agents have rendered unsolicited legal advice:

> A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct by any person or organization prohibited under Standards 12[ ][or] 13. . . .

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 16 (Michie 1998).[9] And,

> [a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except:

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[8] At the time the district court issued its memorandum opinion, Standard 13 contained two subsections; it considered only the constitutionality of then-Standard 13(b). Effective August 29, 1996, the Supreme Court of Georgia eliminated Standard 13(a). See Standard 13 cmt. The current version of Standard 13 is identical to then-Standard 13(b). State authorities may punish a lawyer who violates Standard 13 with any level of discipline up to and including disbarment. *See* Standard 13; Rule 4-102(b).

[9] As with Standards 12 and 13, state authorities may punish a lawyer who violates Standard 16 with any level of discipline up to and including disbarment. *See* Standard 16; Rule 4-102(b).

> (a) A lawyer may accept employment from a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client[.]

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 17(a) (Michie 1998).[10]

Professional responsibility rules on lawyer advertising usually concern purely commercial speech, as do Georgia's standards on in-person solicitation. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) ("Lawyer advertising is in the category of constitutionally protected commercial speech."). As such, in determining their constitutionality, courts apply the "now familiar" framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), and its progeny. *Shapero*, 486 U.S. at 472. To justify a "regulation of lawyer solicitations for pecuniary gain[,]" the state must show that: (1) "it has a substantial interest in proscribing speech"; (2) "the regulation advances the asserted state interest in a direct and material way"; and (3) "the extent of the restriction is in reasonable proportion to the interest served." *Shapero*, 486 U.S. at 472; *Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) (collecting Supreme Court precedents), *cert. denied*, 118 S.Ct. 852 (1998).[11]

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[10] Unlike with Standards 12, 13 and 16, the most severe level of discipline a lawyer who violates Standard 17(a) may receive is a public reprimand. *See* Standard 17(a); Rule 4-102(b).

[11] Alternatively, the state may ban without justification commercial speech that "concerns unlawful activity or is

At the close of the State Bar's case-in-chief, the district court granted Falanga's and Chalker's motions for directed verdict as to Standards 12, 16 (only as it relates to 12) and 17(a).[12] Applying the *Central Hudson* test, the court held that: (1) the State Bar has a substantial interest in (a) "protecting the public from aspects of solicitation that involve fraud, undue influence, intimidation and overreaching[,]" (b) "protecting the tranquility and privacy of personal injury victims and their loved ones against intrusive, unsolicited in-person contact from lawyers[,]" and (c) improving the public's confidence in the legal profession; but (2) the proscriptions on lawyers' in-

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misleading." *Miller*, 117 F.3d at 1382. Solicitation for professional employment in and of itself neither "concerns unlawful activity" nor "is misleading." Therefore, our discussion does not concern the threshold prong of the *Central Hudson* test. *See Central Hudson*, 447 U.S. at 566 ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.").

[12] At trial, the State Bar presented evidence before Falanga and Chalker did because "the party seeking to uphold the restriction on commercial speech carries the burden of justifying it." Edenfield v. Fane, 507 U.S. 761, 770 (1993) (internal quotation marks and citations omitted).

Although Falanga and Chalker labeled their requested relief as a motion for a directed verdict, they in substance moved for a judgment on partial findings. *See* Fed. R. Civ. P. 52(c) (non-jury trials). Directed verdicts apply only in civil jury trials. *See Schlitt v. Florida*, 749 F.2d 1482, 1482-83 (11th Cir. 1985). Even if the trial had been before a jury, recent amendments to the Federal Rules of Civil Procedure have replaced the phrase "directed verdict" with "judgment as a matter of law." *See* Fed. R. Civ. P. 50 & note ("The [1991] revision abandons the familiar terminology of *direction of verdict*[.]").

person, uninvited solicitation do not directly and materially advance these interests because "[a]lthough the [State Bar's] anecdotal evidence demonstrates certain harms that may be associated with in-person solicitation, . . . [it] has failed to demonstrate that these harms are present in all circumstances"; and (3) the proscriptions are "substantially broader than necessary to prevent the harms asserted[.]"

In contrast to its rulings on Standards 12, 16 (only as it relates to 12) and 17(a), the district court found Standards 13 and 16 (only as it relates to 13) to be constitutional. The court concluded that: (1) the State Bar has a substantial interest in (a) "promoting the independent judgment of lawyers[,]" (b) "prohibiting the practice of law by a layman[,]" and (c) "protecting consumers from overreaching by those to be compensated"; (2) the proscriptions "bear[ ] a direct relationship" to advancing these interests; and (3) "prohibiting lawyers from engaging in the practice of paying for referrals is a reasonable method of preventing the harm caused by the overreaching of certain runners[.]"

The State Bar challenges the district court's judgment as to Standards 12, 16 (only as it relates to 12) and 17(a), while Falanga and Chalker cross-appeal its judgment as to Standards 13 and 16 (only as it relates to 13). The essence of the parties' dispute lies in the application of two Supreme Court cases: *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where the Court upheld Ohio's rules against in-person solicitation as applied to a plaintiff-side personal injury lawyer, and *Edenfield v. Fane*, 507 U.S. 761 (1993), where the Court struck down Florida's ban on in-

person solicitation as applied to a certified public accountant.

In *Ohralik*, a personal injury lawyer "approached two young [automobile] accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests." 436 U.S. at 467. The driver was laying in traction in a hospital bed, and the passenger had just returned home from the hospital. The lawyer solicited both victims individually, "urg[ing]" that they retain him. 436 U.S. at 467. He relayed information about the driver's parents' automobile insurance contract to the passenger. Concealing a tape recorder to evince the victims' assent, the lawyer "emphasized that his fee would come out of the recovery, thereby tempting the young [adults] with what sounded like a cost-free and therefore irresistible offer." 436 U.S. at 467. Finally, the day after he obtained consent to represent both the driver and the victim, the lawyer refused the passenger's request that he withdraw. 436 U.S. at 467.

After both the driver and the passenger filed grievances, Ohio authorities sought to discipline the lawyer for in-person solicitation, in violation of Disciplinary Rules (DR) 2-103(A) and 2-104(A) of the state's Code of Professional Responsibility. 436 U.S. at 452-53. DR 2-103(A) provides that "[a] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought

his advice regarding employment of a lawyer." 436 U.S. at 453 n. 9.[13]

Similarly, DR 2-104(A) reads:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
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> (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

436 U.S. at 453 n. 9.[14] The Supreme Court of Ohio sanctioned the lawyer, rejecting his contention that enforcement of the two rules violated his First Amendment commercial speech rights. 436 U.S. at 453-54.

The United States Supreme Court affirmed, holding that a state "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." 436 U.S. at 449, 468. The Court characterized Ohralik's conduct as "a striking *example* of the potential for overreaching that is inherent in a lawyer's

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[13] Ohio's current version of DR 2-103(A) is substantially the same as the version at issue in *Ohralik*. *See* Ohio Rev. Code Ann., Code Prof. Resp., DR 2-103(A) (Baldwin 1998) (gender neutral changes).

[14] Like the current version of Ohio's DR 2-103(A), the current version of DR 2-104(A) is substantially the same as the version at issue in *Ohralik*. *See* Ohio Rev. Code Ann., Code Prof. Resp., DR 2-104(A) (Baldwin 1998) (substituting parenthesis for commas).

in-person solicitation of professional employment." 436 U.S. at 468 (emphasis added). Although *Ohralik* predated *Central Hudson*, the Court's conclusions fit within its framework: (1) the State has a substantial interest in protecting the public from "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct"; (2) "[t]he State's perception of the potential for harm in circumstances" where "a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person" was "well founded"; and (3) the State need not prove actual harm to the person solicited because in one-on-one situations it is "difficult or impossible to obtain reliable proof of what actually took place." 436 U.S. at 462, 464-66 (internal quotation marks omitted).

Nearly fifteen years after *Ohralik*, the Supreme Court decided *Edenfield*. In that case, a certified public accountant (CPA) wanted to "obtain[ ] business clients by making unsolicited telephone calls to their executives and arranging meetings to explain his services and expertise." 507 U.S. at 763. Florida law, however, prohibited the CPA from doing so:

> [A] CPA shall not by any direct, in-person, uninvited solicitation [including telephone calls] solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the CPA, unless such person or entity has invited such a communication.

507 U.S. at 764 (quoting Fla. Admin. Code § 21A-24.002 (2)(c), 21A-24.002(3) (1992)) (internal quotation marks and alterations omitted). The United States Supreme Court agreed with the CPA that "Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's cannot be sustained as applied to [the CPA's] proposed speech." 507 U.S. at 767. Reaching only the first two prongs of the *Central Hudson* test, the Court concluded that: (1) the State has a substantial interest in (a) "ensuring the accuracy of commercial information in the marketplace[,]" (b) "protect[ing] . . . potential clients' privacy[,]" and (c) "maintaining standards of ethical conduct in the licensed professions[,]" including requiring "CPA independence and ensuring against conflicts of interest"; but (2) Florida failed to "demonstrate[ ] that, as applied in the business context, the ban on CPA solicitation advance[d] its asserted interests in any direct and material way." 507 U.S. at 769-71.

Reviewing the record, the *Edenfield* Court found "no studies" nor "any anecdotal evidence, either from Florida or another State" that "suggest[ed] personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that [Florida] claim[ed] to fear." 507 U.S. at 771. The Court rejected as "conclusory" Florida's only evidence, a sworn affidavit of the former chairperson of the state's accounting board. 507 U.S. at 771. Finally, the Court pointed to national reports and accounting literature that acknowledged the absence of "empirical data" or "persuasive evidence" that in-person solicitation "likely . . . lead[s] to false or misleading claims[,] oppressive

conduct" or "compromised independence" on the part of CPAs. 507 U.S. at 772.

Plainly, this case is closer to *Ohralik* than *Edenfield*. Georgia and Ohio restrict lawyers' in-person, uninvited solicitation through substantially identical means. Falanga and Chalker, like Ohralik, practice personal injury law. All three lawyers (and/or their agents) solicit automobile accident victims face-to-face. Unlike the CPA in *Edenfield*, Falanga and Chalker do not contact "prospective *business* clients[.]" 507 U.S. at 771 (emphasis added). Rather, most of their clients are poor and uneducated individuals. Thus, although Falanga's and Chalker's conduct may not be as egregious as Ohralik's, they cannot seriously contend that *Edenfield* saves their case. *See Ohralik*, 436 U.S. at 468 ("[T]he absence of explicit proof or findings of harm or injury is immaterial.").

In case our interpretation of these two authorities leaves any doubt about their differences, the Supreme Court itself distinguished *Edenfield* from *Ohralik:*

> Unlike a lawyer, a CPA is not "a professional trained in the art of persuasion." A CPA's training emphasizes independence and objectivity, not advocacy. . . . The typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*. Fane's prospective clients are sophisticated and experienced business executives who understand well the services that a CPA offers. . . . In general, the prospective client has an existing professional relation with an accountant and so has an independent basis for evaluating the claims of a new CPA seeking professional work.

Edenfield, 507 U.S. at 775 (internal citations omitted). It is true that the *Edenfield* Court viewed *Ohralik's* holding as "narrow and depend[ent] upon certain unique features of in-person solicitation by lawyers that were present in the circumstances of that case." *Edenfield*, 507 U.S. at 774 (internal quotation marks omitted). As the *Edenfield* Court's quoted excerpt from *Ohralik* makes clear, however, the *essential* circumstances of *Ohralik* were that a lawyer engaged in "uninvited" in-person solicitation of "unsophisticated, injured, or distressed lay person[s]." *Edenfield*, 507 U.S. at 774-75 (quoting *Ohralik*, 436 U.S. at 465-66). To be sure, Falanga's and Chalker's circumstances fall squarely within this category of "ambulance chasing." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) (*cited in Ohralik*, 436 U.S. at 459 n.16).

Notwithstanding their reliance on *Edenfield*, Falanga and Chalker dispute the sufficiency of the State Bar's evidence, contending that it failed to advance any concrete proof of the harm that allegedly results from in-person solicitation. We, however, are not convinced. It is true that the State Bar may not rely on "mere speculation or conjecture" to satisfy its burden of justifying Georgia's proscriptions. *Edenfield*, 507 U.S. at 770. On the other hand, commercial speech jurisprudence does not require it to present "empirical data . . . accompanied by a surfeit of background information." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether[.]"). Rather, the State Bar's case may rest "solely on history, consensus, and simple common sense[.]" *Went*

For It, 515 U.S. at 628 (internal quotation marks and citation omitted).

Given these boundaries, the State Bar met its burden of proof as a matter of law. First and foremost, because for all intents and purposes this case *is Ohralik*, the State Bar's reliance on that Court's findings of fact and conclusions of law may have been sufficient in and of itself to justify the standards. *See Went For It*, 515 U.S. at 628; *Ohralik*, 436 U.S. at 468 (facts of the case "demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public").[15] The State Bar, however, presented more. Both its general counsel and assistant general counsel provided anecdotal evidence, relaying the public's complaints about in-person, telephonic and direct mail solicitation. An accident victim herself testified about the intrusive nature of solicitation that Falanga himself initiated.[16]

Additionally, the State Bar presented the results of an independently-conducted study entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia." Although this study focused on television advertising, some of its conclusions are relevant to in-

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[15] *But cf.* Schwartz v. Welch, 890 F. Supp. 565, 574-76 (S.D. Miss. 1995) (although the professional conduct rules at issue had been upheld "in different forums[,]" the court declared them unconstitutional because the state "ignored [its] burden" and failed to provide "proof").

[16] The district court acknowledged that this "anecdotal evidence demonstrates certain harms that may be associated with in-person solicitation[.]"

person solicitation.[17] As the district court recognized, the study posits that the more intrusive the advertising method, the more negative the public's view of lawyers. In fact, the percentage of unfavorable responses increased steadily as consumers considered yellow pages, television, direct mail and telephonic solicitation, and "personal contact" was the "single greatest influence on [the public's] image of lawyers." Overall, the highest percentage of respondents agreed with the proposition that "lawyers track down injured people and try to talk them into taking legal action." Instead, according to the study, consumers "[o]verwhelmingly" prefer to choose a lawyer through methods that they control, that is, references from family, friends, co-workers, etc. From this information, the State Bar could reasonably infer that the majority of legal service consumers view in-person solicitation – whether through lawyers or their agents – as unduly intrusive, destructive to the court system and deserving of regulation.

Supplementing this anecdotal and study evidence, history cuts in favor of the State Bar. Although the Supreme Court of Georgia adopted the standards at issue in the early 1980s, proscriptions on in-person solicitation have been a part of the State Bar's regulatory scheme since its creation in 1963. Thus, it is "not surprising" that the State Bar's evidence lacked specificity on the extent of

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[17] At trial, even Falanga's counsel admitted that the study was at least partially relevant to in-person solicitation. Tr. at 115 (study "deals with the effect of very individual elements of advertising *and solicitation* on both public image as well as fraud or other kinds of conduct that might arise from it") (emphasis added).

the harm associated with in-person solicitation. *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F.Supp. 1328, 1353 (E.D. Tex. 1995) (upholding, among other rules, Texas's proscription on lawyers' telephonic solicitation, noting that "Texas lawyers have been prohibited from telephonic solicitation for some time, and hence a lack of evidence as to fraudulent telephonic solicitations by Texas lawyers is not surprising"), *aff'd*, 100 F.3d 953 (5th Cir. 1996).

In addition to history, consensus supports the State Bar's view. The American Bar Association (ABA) opines that

> [t]here is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

A.B.A. Model Rules of Professional Conduct, Rule 7.3 cmt. (1995). Accordingly, the ABA recommends banning in-person, uninvited solicitation for pecuniary gain:

> (a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
>
> (b) A lawyer shall not solicit professional employment from a prospective client . . . by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
>
> (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> (2) the solicitation involves coercion, duress or harassment.

Model Rule 7.3. No less than 32 states proscribe in-person solicitation in the same or similar manner.[18] Ten other

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[18] These states are: (1) Alabama, (2) Alaska, (3) Arizona, (4) Arkansas, (5) Colorado, (6) Delaware, (7) Florida, (8) Hawai'i, (9) Idaho, (10) Illinois, (11) Indiana, (12) Kansas, (13) Kentucky, (14) Louisiana, (15) Michigan, (16) Minnesota, (17) Mississippi, (18) Missouri, (19) Nevada, (20) New Hampshire, (21) New Jersey, (22) North Carolina, (23) Oklahoma, (24) Pennsylvania, (25) Rhode Island, (26) South Carolina, (27) South Dakota, (28) Tennessee, (29) Texas, (30) Utah, (31) Washington, and (32) West Virginia. (For citations, see *supra* note 5.) *Cf.* O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 398, 401-02 (Tex.1988) (holding that "a ban against in-person solicitation of clients by lawyers or runners is substantially related to legitimate state goals and could not be more narrowly tailored"). *See generally* Lawyer Disciplinary Bd. v. Allen, 479 S.E.2d 317, 328 (W. Va. 1996) (holding that commercial speech jurisprudence does not protect "direct telephone solicitation of a prospective client with whom the lawyer has no family or prior professional relationship,

states have rules identical or similar to those of Georgia and Ohio.[19] Two states appear to prohibit in-person,

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when at least partially motivated by the potential for the lawyer's pecuniary gain").

Prior to its restricting in-person solicitation, New Jersey experienced "definite social harms" such as "harassment, over-reaching, provocation of nuisance litigation and schemes for systematic fabrication of claims[.]" New Jersey Rules of Ct., R. Prof. Conduct 7.3 cmt. (West 1997).

[19] These states are: (1) Connecticut, (2) Maryland, (3) Missouri, (4) Nebraska, (5) New Mexico, (6) New York, (7) Oregon, (8) Vermont, (9) Wisconsin, and (10) Wyoming. (For citations, see *supra* note 5.) *See generally* Unnamed Att'y v. Attorney Grievance Comm'n, 545 A.2d 685, 691 (Md. 1988) ("[W]ritten modes of solicitation (*as opposed to in-person solicitation*) are protected by the First Amendment, regardless of the recipient's condition, so long as such communication is neither false, misleading, nor overreaching.") (emphasis added).

The regulations that these twelve states (including Georgia and Ohio) employ resemble the ABA's Model Code of Professional Responsibility (1980), the predecessor to the Model Rules. The Model Code is not materially different from the Model Rules with respect to in-person solicitation. If anything, the Model Code is less restrictive than the Model Rules because only the former (at least Georgia's and Ohio's version of it) permits lawyers to solicit "close friends." Standard 17(a); Tr. at 207 (testimony of the State Bar's general counsel).

Prior to their restricting in-person solicitation, Connecticut and Maryland, like New Jersey, experienced "definite social harms" such as "harassment, over-reaching, provocation of nuisance litigation and schemes for systematic fabrication of claims[.]" Connecticut Rules of Ct., Rules Prof. Conduct 7.3 cmt. (West 1997); Maryland Rules of Ct., R. Proced. 16-812, R. Prof. Conduct 7.3 cmt. (West 1998).

uninvited solicitation under any circumstance.[20] Virginia allows in-person solicitation for many purposes except "compensation in a personal injury or wrongful death claim."[21] California's rule begs the question, that is, it prohibits lawyers and their agents from soliciting most potential clients unless the First Amendment protects their speech.[22] Only four jurisdictions – the District of

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[20] *See* Iowa Code Ann. tit. XV, subtit. 2, ch. 602 app., Code Prof. Resp. for Lawyers, DR 2-101(B)(4)(a) (West 1998) (banning "in-person . . . solicitation of legal business *under any circumstance*") (emphasis added); Massachusetts Rules of Ct., Supreme Judicial Ct. R. 3:07, R. Prof. Conduct 7.3(d) & cmt. (West 1998) (absent the prospective client's initiation, "[a] lawyer shall not solicit professional employment for a fee from a prospective client in person"); *cf.* In the Matter of Amendment to S.J.C. Rule 3:07, DR 2-103 & DR 2-104, 495 N.E.2d 282, 286 (Mass. 1986) (adopting a "prophylactic rule imposing a blanket ban on *all* in-person solicitation[,]" including friends, relatives and former clients, because "unless the prohibition is all inclusive, the Commonwealth's interests in professionalism and the prevention of misrepresentation and overreaching are not adequately served") (emphasis added).

[21] Virginia Rules of Ct., Supreme Ct. Rules, part 6, § 2, Code Prof. Resp., DR 2-103(A), (F) (West 1997) (absent lies, undue influence, harassment, etc., or "a substantial potential for" any such conduct, lawyers may solicit potential clients for professional employment other than "compensation in a personal injury or wrongful death claim").

[22] *See* Cal. Bus. & Prof. Code, R. Prof. Conduct for the State Bar 1-400(C) (West 1998); *cf.* In Matter of Scapa, Nos. 88-0-12498, 88-0-12499, 2 Cal. State Bar Ct. Rptr. 635, 652 (Cal.Bar Ct., Nov. 3, 1993) (evidence that lawyers' agents solicited injured persons "armed with police accident reports the victims wanted and often could not obtain themselves as quickly" showed "the constitutional justification for California's rules prohibiting in-person solicitation").

Columbia, Maine, Montana and North Dakota – liberally permit in-person solicitation, but not without limitation.[23]

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[23] *See* District of Columbia Rules of Ct., Rules Governing the Bar app. A, R. Prof. Conduct 7.1(b)-(d) (West 1998) (absent lies or undue influence, lawyers may solicit potential clients face-to-face unless they are "apparently in a physical or mental condition which would make it unlikely that the potential client[s] could exercise reasonable, considered judgment as to the selection of a lawyer"); Maine Rules of Ct., Bar Rules, Code Prof. Resp., Rule 3.9(f) (West 1997) (absent lies or harassment, lawyer may solicit a potential client face-to-face unless "the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited" such as someone "under treatment in a hospital"); Montana Rules of Ct., R. Prof. Conduct 7.3 (West 1997) (absent harassment, a lawyer may solicit a potential client face-to-face unless he or she tells the lawyer to stop or the lawyer "knows or reasonably should know that the physical, emotional, or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer"); North Dakota Ct. Rules, R. Prof. Conduct 7.1 (West 1998) (absent lies, undue influence, harassment, etc., a lawyer may engage in in-person, uninvited solicitation).

Although it generally finds "no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact[,]" the District of Columbia does recognize that "[i]n-person solicitation can . . . create additional problems" in circumstances "not conducive to intelligent, rational decisions." District of Columbia Rules of Ct., Rules Governing the Bar app. A, R. Prof. Conduct 7.1 cmt. (West 1998).

This consensus information stands in sharp contrast to that in *Edenfield*, where only four states, including Florida, prohibited CPA's from soliciting potential clients face-to-face. 507 U.S. at 771. As to lawyers, the converse exists – only four jurisdiction [sic] allow in-person solicitation, and even they employ some restrictions on it.

As for "simple common sense," we need go no further than the four-corners of *Ohralik*. Contrasting in-person solicitation from "truthful, restrained advertising concerning the availability and terms of routine legal services," prohibitions on which the Court struck down in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court opined that

> [u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for a remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services . . . ; it actually may disserve the individual and societal interest . . . in facilitating "informed and reliability decisionmaking."

Ohralik, 436 U.S. at 454, 457-58 (internal citations and footnotes omitted). Several Court decisions echo this "common sense," reading *Ohralik* to mean that "a State may categorically ban" all "in-person solicitation by lawyers for profit[.]" *Shapero v. Kentucky Bar Ass'n*, 486 U.S.

466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 641 (1985) (The "possibilities for overreaching, invasion of privacy, the exercise of undue influence, outright fraud" and other "unique features of in-person solicitation by lawyers . . . justif[y] a prophylactic rule prohibiting lawyers from engaging in solicitation for pecuniary gain[.]"); *In re R.M.J.*, 455 U.S. 191, 202 (1982) ("In *Ohralik*[,] . . . the Court held that the possibility of fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct, was so likely in the context of in-person solicitation, that such solicitation could be prohibited.") (internal quotation marks omitted).

In light of the foregoing, we hold that the district court erred in concluding that the State Bar failed to justify Georgia's restrictions on commercial speech as contained within Standards 12, 16 (only as it relates to 12) and 17(a), but correctly found that Standards 13 and 16 (only as it relates 13) pass constitutional muster.[24] Unquestionably, the interests that the State Bar asserted are substantial, namely, protecting the public from vexatious conduct (Standards 12, 13, 16 and 17(a)); preventing invasions of privacy and improving the public's confidence in the legal profession (Standards 12, 16 (only

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[24] Additionally, the district court charged the State Bar with the wrong burden of proof. It stated that "the Bar . . . failed to demonstrate that [the harms associated with in-person solicitation] are present *in all circumstances*." (Emphasis added). In an as-applied challenge, however, "the constitutionality of a ban on personal solicitation will depend upon the *identity of the parties* and the precise *circumstances of the solicitation*." *Edenfield*, 507 U.S. at 774 (emphasis added).

as it relates to 12) and 17(a)); promoting the independent judgment of lawyers and prohibiting the unauthorized practice of law (Standards 13 and 16). *See Ohralik*, 436 U.S. at 462; *Edenfield*, 507 U.S. at 769-70; *Went For It*, 515 U.S. at 625.

Standards 12, 16 (as it relates to 13) and 17(a) "directly and materially advance[ ]" at least one of these respective interests. *Went For It*, 515 U.S. at 624, 625 n.1. As we have discussed, the State Bar presented sufficient evidence as a matter of law to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Went For It*, 515 U.S. at 626 (internal quotation marks and citation omitted). The same conclusions are equally, if not more, applicable to Standards 13 and 16 (as it relates to 13). *See Ohralik*, 436 U.S. at 464 n.22 ("solicitation by a lawyer's agents or runners . . . present[s] similar problems" as solicitation by a lawyer).

Finally, Georgia's prophylactic ban on in-person solicitation, whether the actor be a lawyer or a non-lawyer, stands in reasonable proportion to the interest served. *See Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The standards at issue are not over-inclusive as applied to the essential circumstances of this case, as "we do not see numerous and obvious less-burdensome alternatives[.]" *Went For It*, 515 U.S. at 633 (internal quotation marks and citation omitted). Georgia does not prohibit lawyers from soliciting close friends, relatives or most clients. Further, they may seek professional employment from anyone who initiates the

solicitation.[25] Importantly, many other modes of advertising are available to lawyers. *See Shapero*, 486 U.S. at 474 ("The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."); *e.g.*, State Bar's Initial Brief at 52 ("Nothing in the rules prohibit an attorney from sending potential clients written communications inviting the potential client to contact the lawyer if the individual would be interested in a personal presentation.").[26] Accordingly, we affirm the district court's judgment as to Standards 13 and 16 (only as it relates to 13), but reverse its judgment as to Standards 12, 16 (only as it relates to 12) and 17(a).

B.

In its memorandum opinion following trial, the district court addressed the constitutionality of several other lawyer advertising standards that Falanga and Chalker

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[25] Like the rules at issue in *Ohralik*, Georgia's standards do "not prohibit a lawyer from giving unsolicited legal advice; [they] proscribe[ ] the acceptance of employment resulting from such advice." 436 U.S. at 458.

[26] The State Bar's general counsel testified that Standard 12 prohibits telephonic, as well as in-person, solicitation. Falanga's and Chalker's motion for judgment on partial findings on the constitutionality of Standards 12 and 16, however, concerned only in-person solicitation, as did the district court's judgment. Therefore, we need not decide whether Georgia's restriction on telephonic solicitation violates Falanga's and Chalker's commercial speech rights.

challenged. In the first of these standards, Georgia prohibits lawyers from creating an "unjustified expectation" about a client's chances, and comparing their services with those of another lawyer in a way that they cannot factually substantiate:

> A lawyer shall not make any false, fraudulent, deceptive, or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> . . .
>
> (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the disciplinary rules or other law; [or]
>
> (3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated[.]

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 5(a)(2)-(3) (Michie 1998).[27] To this aim, lawyers may not, for example, employ the slogan "We will never lose a case!" on their letterhead:

> A lawyer shall not use a firm name, professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing or similar professional notice or designation that includes a statement or claim that is false, fraudulent,

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[27] State authorities may punish a lawyer who violates Standard 5(a)(2) or 5(a)(3) with any level of discipline up to and including disbarment. *See* Standard 5(a); Rule 4-102(b).

> deceptive or misleading. A statement or claim is false and misleading if it violates the provisions of Standard 5 [in this case, 5(a)(2) or 5(a)(3)].

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 8 (Michie 1998).[28] The district court upheld these standards as constitutionally applied to Falanga and Chalker, concluding that: (1) as a threshold matter, the State Bar has the absolute right to prohibit lawyers from stating or implying that they will violate the law; (2) in any event, the State Bar has a substantial interest in "assuring the free flow of accurate information in the market place"; (3) it presented sufficient evidence of actual and likely miscomprehension from communications that create an unjustified expectation of success, and requiring factual substantiation helps to ensure accurate comparison of lawyers' services; and (4) Standards 5(a)(2), 5(a)(3) and 8 "provide . . . reasonable means for achieving" the state's interest.

Next, Georgia requires lawyers to disclaim written solicitations as "Advertisements" patently on the envelope's face and at the top of each page:

> Written communications to a prospective client for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in typesize no smaller than the largest typesize used in the body of the letter.

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[28] Unlike Standard 5(a), Standard 8 permits any level of discipline up to and including a public reprimand, not disbarment. *See* Standard 8; Rule 4-102(b).

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 6(b) (Michie 1998).[29] Rejecting Falanga's and Chalker's constitutional challenge of this standard, the district court found that: (1) the State Bar has a substantial interest in reducing consumer confusion and protecting consumers' privacy; (2) "[t]he State Bar . . . provided sufficient evidence of the harm that [it] seeks to prevent"; and (3) Standard 6(b) "is a reasonable means of preventing the harms asserted" since "the [advertisement] designation allows the consumer to choose whether he or she is interested in the information it contains and prevents the communication from being misleading by omission."

Additionally, just as written solicitations must be disclaimed as advertisements, "[a] public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication." Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 7(a) (Michie 1998).[30] The district court held that this standard does not run afoul of the First Amendment, finding that: (1) "[t]he State Bar has a substantial interest in reducing consumer confusion and . . . insuring the accurate flow of information"; (2) allowing "the consumer to know whether the . . . subject

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[29] State authorities may punish a lawyer who violates Standard 6(b) with any level of discipline up to and including disbarment. *See* Standard 6(b); Rule 4-102(b).

[30] State authorities may punish a lawyer who violates Standard 7(a) with any level of discipline up to and including a public reprimand. *See* Standard 7(a); Rule 4-102(b).

of the communication was newsworthy in its own right or . . . purchased" directly and materially serves these interests because it "provides additional information . . . as to the impetus of the communication"; and (3) Standard 7(a) "is a reasonable means to ensure that communications regarding legal services are accurate and complete . . . [and] does not impose any undue burden on the lawyer."

Finally, Georgia places restrictions on lawyers who wish to hold themselves out as "specialists":

> A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:
>
> (a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;
>
> (b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and
>
> (c) A lawyer who has been certified as a specialist in a particular field of law or law practice as a result of having successfully completed a program of legal specialization approved by the State Disciplinary Board of the State Bar of Georgia may publicly communicate the fact that he has satisfied the requirements of that particular program.

Georgia Rules of Ct. Ann., Rules & Regulations for the Org. and Gov't of the State Bar of Ga., Rule 4-102, Standard 18 (Michie 1998).[31] The district court sustained this standard as well, concluding that: (1) the State Bar has a substantial interest in "protecting consumers from misleading attorney advertising"; (2) it "demonstrated a substantial likelihood that the use of the word 'specialist' could be misleading to consumers"; and (3) because of subsection (c) and the State Bar's representation in open court that "it would entertain additional categories of 'specialist' at the request of a particular practice group or area of law," "Standard 18 is a reasonable means . . . to reduce or eliminate consumer confusion."[32]

Falanga and Chalker cross-appeal these rulings, arguing that the standards impermissibly snare truthful speech, are over-inclusive, fail to target "real" harm, and/or arbitrarily restrict legitimate advertising. The State Bar defends the district court's judgment, pointing to anecdotes, the study and other evidence that it introduced at trial. Upon *de novo* review and due consideration, "[w]e agree with the district court's analysis and

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[31] State authorities may punish a lawyer who violates Standard 18 with any level of discipline up to and including a public reprimand. *See* Standard 18; Rule 4-102(b).

[32] The Supreme Court of Georgia has reached similar conclusions about Standard 18. *See* Matter of Robbins, 469 S.E.2d 191, 193-194 (Ga. 1996) (upholding the constitutionality of Standard 18 "on its face and as applied[,]" finding "a reasonable possibility that a significant percentage of the public reading the term 'specialist' in a lawyer's advertisement[ ] might be misled into thinking an attorney has been 'certified' or 'designated' or has otherwise met objective standards established by a recognized organization").

need go no further[.]" *Wilson*, 132 F.3d at 1480. Each of these standards directly and materially advance at least one substantial state interest in a reasonably proportionate and narrowly-drawn manner. *See Went For It*, 515 U.S. at 624; *Miller*, 117 F.3d at 1382. Accordingly, we readily affirm the district court's judgment that Standards 5(a)(2), 5(a)(3), 6(b), 7(a), 8 and 18 are constitutional as applied to Falanga and Chalker.

III. CONCLUSION

In sum, we affirm the district court's judgment that Standards 5(a)(2), 5(a)(3), 6(b), 7(a), 8, 13, 16 (only as it relates to 13) and 18 survive First Amendment scrutiny as applied to Falanga and Chalker.[33] We reverse, however, the district court's judgment that Standards 12, 16 (only as it relates to 12) and 17(a) are unconstitutional.[34] We

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[33] Pursuant to Eleventh Circuit Rule 36-1, we affirm but do not discuss three other issues that Falanga and Chalker present in their cross-appeal: (1) whether the district court erred in dismissing their claim that despite the State Bar's concession that it has not, does not and will not enforce them, the following statutes are unconstitutional: O.C.G.A. §§ 15-19-55, 15-19-56, 15-19-57(2) to (3), 15-19-58(2) to (4), 16-10-95(a)(3), 35-1-9 and 33-24-53; (2) whether the district court erred in failing to join Georgia's Attorney General or any other party necessary to litigate the constitutionality of these statutes; and (3) whether the district court erred in denying Falanga's and Chalker's motions to compel and in granting the State Bar's motion for attorneys' fees incurred in opposing their motions to compel.

[34] We also reverse the district court's grant of attorneys' fees to Falanga and Chalker. Simply put, they are no longer the "prevailing party" with regard to Standards 12, 16 (only as it relates to 12) and 17(a). 42 U.S.C. § 1988(b) (1994); *cf. Hewitt v.*

hold that Georgia's prohibiting lawyers and their agents from engaging in in-person, uninvited solicitation of professional employment does not violate the First Amendment commercial speech rights of Falanga, Chalker and other similarly situated lawyers who approach "unsophisticated, injured, or distressed lay person[s]." *Edenfield*, 507 U.S. at 774-75 (quoting *Ohralik*, 436 U.S. at 465-66).

AFFIRMED IN PART; REVERSED IN PART.

Helms, 482 U.S. 755, 760 (1987) (section 1983 plaintiff was not the "prevailing party" because, among other reasons, he "obtained no relief" from the district court and "the Court of Appeals granted no relief of its own, declaratory or otherwise"). Consequently, Falanga's and Chalker's cross-appeal concerning the amount of fees awarded is moot.

(2)

Supreme Court, U.S.

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT FALANGA and RONALD CHALKER,

Petitioners,

vs.

STATE BAR OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT FALANGA; RONALD CHALKER; and RALPH STEVEN GOLDBERG, Plaintiffs,	CASE NO. 1:95-cv-2160-GET
v.	
THE STATE BAR OF GEORGIA, Defendant.	

ORDER

(Filed Jul. 18, 1996)

The above-styled matter is an action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of certain rules governing the practice of law in the State of Georgia. The action came on for a non-jury trial commencing on May 6, 1996.

Findings of Fact and Conclusions of Law

1.

Plaintiffs are attorneys licensed to practice law in the State of Georgia. Defendant is the State Bar of Georgia. The State Disciplinary Board of the State Bar is authorized by the Supreme Court of Georgia to investigate, discipline and punish members of the State Bar of Georgia, and those licensed to practice law in Georgia, for violations of the Standards of Conduct set forth in Bar

Rule 4-102. Rules governing attorney disciplinary proceedings are set forth in Bar Rule 4-201 *et seq*. (*See* Defendant's exhibit 8).

2.

Plaintiffs challenge the following Disciplinary Standards: Standards 5(a)(2), (3), and (4); 6(a) and (b), (d)(4); 7(a); 8; 12; 13(a) and (b); 16; 17(a); 18; 26; and 30, as well as Disciplinary Rule 18. Plaintiffs also challenge the following state statutes: O.C.G.A. § 15-19-55; 15-19-56; 15-19-57(2)(3); 15-19-58(2), (3), & (4); O.C.G.A. § 16-10-95(a)(3); 35-1-9, and 33-24-53.

3.

On October 27, 1995, defendant filed a motion to dismiss plaintiffs' complaint on the grounds that there are ongoing State Bar disciplinary proceedings involving plaintiffs Falanga and Chalker and therefore, this Court should abstain from exercising its jurisdiction under the *Younger* doctrine. *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). After a hearing was held on the matter, the parties resolved the *Younger* issue among themselves by adding Ralph Goldberg as a party plaintiff and, on February 20, 1996, submitted the following stipulation to the court: "*Younger* is taken out of the case. Falanga or Chalker will not challenge any of the charges that the State Bar believes are pending against Falanga or Chalker as stated in the pretrial order by defendant. Ralph S. Goldberg will be added as party plaintiff to challenge the standards that the State Bar believes are pending against Falanga and Chalker. It is agreed that neither Falanga or

Chalker will be prosecuted until the District Court issues a final judgment. Falanga and Chalker agree that any argument based on delay because of the State Bar's forbearance is waived."

4.

Plaintiffs have withdrawn their First Amendment challenge to Standards 26 and 30. Furthermore, plaintiffs and defendant concede that Standard 6(a) is not a prohibition involving any speech and therefore, this Court need not address the constitutionality of this standard. Standards 5(a)(4), 6(d)(4) and 13(a) are presently before the Supreme Court of Georgia for consideration of the defendant's petition requesting that Standards 5(a)(4) and 13(a) be eliminated and that Standard 6(d)(4) be altered. Defendant has stipulated that these standards will no longer be enforced as they currently exist. Therefore, the Court defers ruling until the defendant has had a reasonable opportunity to secure a decision from the Georgia Supreme Court with regard to defendant's petition. Plaintiffs' constitutional challenge as to Standards 5(a)(4), 6(d)(4) and 13(a) is dismissed without prejudice to plaintiffs' right to attack these standards if the Supreme Court does not act favorably on the State Bar's request.

First Amendment Challenge

5.

As commercial speech, restrictions on attorney advertising are evaluated under the framework established by the United States Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557,

100 S. Ct. 2343 (1980). *Florida Bar v. Went-For-It, Inc.*, 115 S. Ct. 2371, 2376 (1995). Under *Central Hudson*, the government, may regulate commercial speech that concerns unlawful activity or is misleading. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350. Other commercial speech also may be regulated if the government satisfies the following: (1) the government must establish a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be "narrowly drawn." *Id.* at 564-65, 100 S. Ct. at 2350-51.

6.

The *Central Hudson* standard does not permit the court to supplant the precise interests put forward by the State with other suppositions. *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). In the present case, the State Bar has asserted the following interests in support of the challenged standards of conduct: (1) the regulation of the legal profession; (2) prevention of consumer harm by assuring that communications about legal services are accurate, complete and not misleading to potential clients; (3) protection of the privacy rights of Georgia citizens; (4) prevention of the consumer harm by restricting those aspects of legal advertising and solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct; and (5) cessation of the erosion of confidence in the profession that is engendered by invasive methods of legal advertising.

7.

The court finds that the State Bar has a substantial interest in the areas asserted. A state, as part of its power to protect public health and safety, as well as other valid interests, had broad power to regulate the practice of professions. *Went-For-It*, 115 S. Ct. at 2376; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 1920 (1978). States bear a "special responsibility for maintaining standards among members of the licensed professions." *Ohralik*, 436 U.S. at 460, 98 S. Ct. at 1920 (citing *Williamson v. Lee Optical Co.*, 348 U.S 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935)). The State Bar's interest in regulating lawyers "is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Ohralik*, 436 U.S. at 460, 98 S. Ct. at 1920.

8.

Furthermore, the protection of a potential client's privacy has been recognized as a substantial state interest. *Edenfield*, 113 S. Ct. at 1799. The Supreme Court has also recognized that the Bar has a substantial interest in protecting injured citizens "from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Went-For-It*, 115 S. Ct. at 2381. Finally, the state has a substantial interest in ensuring the accuracy of commercial information in the market place. *Edenfield*, 113 S. Ct. at 1799.

9.

With regard to the last two *Central Hudson*, factors, "the burden of justifying the [standards] falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense . . . " *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, 63 F.3d 1318, 1323 (4th Cir. 1995). While the Court in *Went-For-It* reiterated the principle that the government may not support a regulation by mere speculation and conjecture, it also acknowledged that anecdotal evidence is an acceptable method of proof. *Went-For-It*, 115 S. Ct. at 2377. With regard to the Court's recent decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), although the rationale of the holding of that case is less than clear to this court, it apparently does not substantially change existing law, at least insofar as it is applicable to the issue of attorney advertising and the facts of this case. *Id.*

10.

In determining whether there is sufficient "fit" between the standards and the interests to be served, it is not necessary to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. "The proper standard for approval must involve an assessment of the reasonableness of the [State Bar]'s belief that the means it selected will advance its ends." *Penn Advertising*, 63 F.3d at 1325, (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)); *See Messer v. Douglasville*, 975 F.2d 1505, 1513 (11th Cir. 1992) (upholding regulation that was not substantially broader

than necessary even though less restrictive alternative available).

11.

William P. Smith, III is the General Counsel for the State Bar of Georgia. He has held this position for twelve years. Acting as the Chief Disciplinary Counsel, he enforces the Standards of Conduct. He also participates in the National Organization of Bar Counsel which deals with the common concerns related to the regulations of the profession in the United States and Canada. In these positions he has received and considered numerous consumer complaints regarding the conduct of attorneys which members of the public consider offensive.

12.

Defendant produced evidence in the form of a survey conducted by Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt ("Georgia Survey") (Defendant's exhibit 7). Dr. Bernhardt testified as to the methods used in conducting the survey as well as to the results of the survey. According to the results of the Georgia Survey, while consumers generally favor legal advertising, the more intrusive the advertising method used, the more negative the attitude towards attorneys who advertise in that medium. The Yellow Pages generated the most favorable response. Respondents were 27 percent favorable and 40 percent unfavorable toward television advertising. Respondents were one-fourth favorable and one-half unfavorable toward direct-mail. As to attorneys who use

telemarketing, 58 percent viewed them unfavorably while only 13 percent of respondents viewed them favorably.

13.

Forty percent of respondents rated lawyer advertising as very influential or influential in shaping their overall impression of lawyers. Fifty-eight percent agreed with the statement that "Advertising by lawyers has reduced the public's respect for the legal system." About forty percent of the sample agreed with the statement "Advertising has lowered the dignity of the legal profession." These consumers were even more likely to agree that attorney advertising has reduced the public's respect for the legal system than were the respondents in a survey of Georgia consumers conducted in 1988-1989.

14.

The results of the survey show that miscomprehension levels for commercials ranged from 26 percent to 45 percent. The average for miscomprehension across all commercials was 35 percent. Several factors appeared to impact miscomprehension levels. First, the higher the education, the lower the miscomprehension. Also, miscomprehension was lower for those respondents who knew the most attorneys personally. The comprehension levels were significantly higher for print ads than for television ads, possibly because individuals have more control over the processing of print material because they can control the pace of processing the material themselves.

15.

In regard to the attorney selection process, "referral" was the dominant method used by respondents in selecting or learning about their most recently used attorney. Those who were more likely to consider mass media advertising as important in selecting an attorney were aged 18-24 with high school education or less, incomes under $15,000 and with little knowledge of attorneys or the legal system.

16.

Lower-income people were most likely to agree that "Lawyers are important to society because they protect everyone's legal rights." The lowest educated group was most likely to believe that "Lawyers are more concerned about the best interest of their clients than they are about making money." However, when respondents were asked about their level of agreement with other statements, the strongest agreement was with these statements: "Justice is bought and sold in our legal system" and "Lawyers clog up the court system with unnecessary lawsuits." About half of the respondents agreed that "Lawyers track down injured people and try to talk them into taking legal action." However, the statement, "Lawyers are important to society because they protect everyone's legal rights" also received about fifty percent agreement.

17.

Plaintiffs Falanga and Chalker are attorneys licensed to practice in the State of Georgia. Eighty percent of their

practice consists of representing plaintiffs in automobile accident litigation. They also handle medical malpractice, product liability, "slip and fall," worker's compensation and insurance bad faith litigation. Many of their clients are poor and uneducated.

18.

Falanga described his marketing plan which includes direct mail and networking of referral sources. Plaintiffs also presented the testimony of two chiropractors who described the referral system from their perspective.

19.

Dr. Richard Cebula is an economics professor at the Georgia Institute of Technology. He offered his opinion as to the reliability of the Georgia Survey, as well as an overview of the history of lawyer advertising and various studies that have been conducted as to the impact of advertising on the opinion of the consumer, which he researched and prepared in anticipation of his testimony. Dr. Cebula criticized the Georgia Survey as unrepresentative because it was conducted at various regional malls. Dr. Cebula stated that, as an economist, he preferred empirical data, such as United States Labor Department statistics, rather than opinion surveys, such as the Georgia Survey, because opinions cannot be quantified. Dr. Cebula also stated that his review of various studies leads him to believe that lawyer advertising has had a small positive benefit, or at the very worst, a negligible impact on the image of the profession.

Standards

20.

Each of the challenged standards must be evaluated separately to determine whether it does not sweep more broadly than necessary to serve the defendant's substantial interests.

> **Standards 5.**
>
> **(a) A lawyer shall not make any false, fraudulent, deceptive, or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: . . .**
>
> **(2) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the disciplinary rules or other law;**
>
> **(3) compare the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated; . . .**

21.

The State has a substantial interest in assuring the free flow of accurate information in the commercial market place. *See generally, Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 (1977). The Supreme Court has recognized that a communication which offers "overblown assurances of client satisfaction" may be misleading. *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 479, 108 S. Ct. 1916, 1925 (1988). *See Bates,* 433 U.S. at 383-84, 97 S. Ct. at 2709 (stating advertising claims as to the quality of

legal services may be so misleading as to warrant restriction).

22.

Standard 5(a)(2) is intended to reduce false, fraudulent or misleading advertising and therefore, is clearly the type of commercial speech regulation to which the Supreme Court has applied lesser scrutiny. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350 (government may ban forms of communication which are more likely to deceive the public than inform it). Standard 5(a)(2) is directed toward communications that are "likely to create an **unjustified** expectation about the results the lawyer can achieve . . . " (emphasis added). Defendant presented evidence which suggests that those consumers who are most likely to use advertising to select an attorney are also the same consumers who are more likely to experience greater miscomprehension of the commercial message. Defendant also presented evidence regarding consumers who had been misled by attorney advertising which created unjustified expectations regarding results.

23.

Standard 5(a)(2) also prohibits communications that state or imply that the lawyer "can achieve results by means that violate the disciplinary rules or other law." Government may ban forms of commercial speech related to illegal activity. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350. Such a ban need not be restricted to the service of some substantial governmental interest. Furthermore, the government has a substantial interest in

protecting the public from attorneys who would use speech which is violative of the law to promote the attorney's services. It is inherently misleading and improper for an attorney to state that he can achieve results by means which violate the disciplinary rules and, furthermore, the Bar has a substantial interest in protecting the public against such communications. Standard 5(a)(2) is not an absolute ban on results-oriented advertising. Attorney's simply must have prior justification for any claims made.

24.

Standard 5(a)(3) likewise is not an absolute ban on communications that compare the quality of one lawyer's services to that of another lawyer. The standard merely restricts misleading comparisons by requiring factual substantiation of any comparison made. *See generally, Bates,* 433 U.S. 350, 97 S. Ct. 2691 (1977).

25.

The Court finds that Standards 5(a)(2) and 5(a)(3) provide a reasonable means for achieving the State's goal of assuring the free flow of accurate information in the market place and, therefore, do not violate the First Amendment's protection of commercial speech. Accordingly, Standards 5(a)(2) and 5(a)(3) are not unconstitutional for any of the reasons asserted.

26.

Standard 6.

(b): Written communications to a prospective client for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in typesize no smaller than the largest typesize used in the body of the letter. . . .

27.

The State Bar asserts that this Standard is primarily directed at three goals (1) preventing communication to consumers that is misleading by omission, (2) protecting consumers from invasion of privacy, and (3) reducing the anxiety that consumers experience upon receiving an unexpected letter from an attorney. The Supreme Court has recognized that lawyers may be required to stamp "advertisement" upon their solicitation letters without running afoul of the First Amendment. *Shapero,* 486 U.S. at 476-78, 108 S. Ct. at 1923-24. In *Shapero,* the Court struck down an absolute ban prohibiting lawyers from sending direct-mail solicitation letters to consumers, finding that this absolute ban was not justified by the mere potential that a mistake might occur in the delivery. *Id.* at 1925. However, the Court recognized that a personalized letter from a lawyer presents risks of deception and suggested, in *dicta,* that the State could require the letter to bear a label identifying it as an advertisement. *Id.* at 477, 108 S. Ct. at 1924.

28.

In *Texans Against Censorship v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995), the district court recognized that personalized letters from attorneys which do not contain the affirmative disclosure "Advertisement" may invoke anxiety. *Id.* at 1360. The court stated:

> Many of these citizens find the solicitation letters distressing, especially when the letters arrive shortly after a traumatic event. The requirement that such letters, and the envelopes enclosing them, be stamped 'ADVERTISEMENT' is likely to reduce the anxiety such letters cause consumers, because they will know immediately that they are only advertisements, and do not contain other, more evocative messages.

Id.

29.

Similar harm has been experienced by consumers in Georgia. The State Bar presented the testimony of Kay Sterniolo who stated that, upon receiving an unexpected letter from a law firm that was not marked "Advertisement," she mistakenly believed that someone was suing her. She further testified that she was annoyed by this letter and that, had she known it was an advertisement, would not have viewed it as imperative to open it but could have considered whether to disregard the letter. Smith and Davis also testified that they received complaints regarding the offensive nature of such mailings. In the experience of Smith and Davis, such mailings tend to erode consumer confidence in the legal profession. While

the standard at issue in this case does not appear to be limited to personalized or targeted communications, the court finds that the same considerations recognized by the Supreme Court in *Shapero* and the District Court in *Texans Against Censorship*, are present in this case. The State Bar has provided sufficient evidence of the harm that the standard seeks to prevent.

30.

The court also finds that the regulation is a reasonable means of preventing the harms asserted by defendant. The word "advertisement" has a common meaning and understanding among most members of the general public. Dr. Bernhardt testified that the word "advertisement" is generally understood by consumers and serves as an affirmative disclosure. Posted on an envelope or letterhead, "Advertisement" gives the reader additional information about the context of the written material. This allows the consumer to choose whether to discard the envelope without reading the material and the opportunity to read the communication knowing from the start that it is an advertisement.

31.

Although plaintiffs assert that the designation of "advertisement" deprives the consumer of the opportunity to read the communication, the court finds this argument to be disingenuous. While a more elaborate and burdensome disclaimer might dilute the central message, nothing about the single word "advertisement" prevents

the consumer from reading and understanding the material. Rather, the designation allows the consumer to **choose** whether he or she is interested in the information it contains and prevents the communication from being misleading by omission. *See Texans Against Censorship*, 888 F. Supp. at 1360-61 (stating that it is the consumer's right to choose to dispose of attorney solicitation letter without reading it). Accordingly, Standard 6(b) is not unconstitutional for any of the reasons asserted by the plaintiffs.

32.

Standard 7.

(a): A public communication for which the lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. . . .

33.

The State Bar asserts that this standard is intended to assure that communications about legal services are accurate, complete and useful to the potential client. It allows the consumer to know whether the event that is the subject of the communication was newsworthy in its own right or if the communication was purchased. The requirement provides the consumer with additional information and reduces the possibility of consumer confusion.

34.

The First Amendment protection to commercial speech is justified because of the value to consumers of the information such speech provides. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S. Ct. 2265, 2282 (1985). For this reason, the Supreme Court has stated that a plaintiff's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* Disclaimers may be appropriate in order to reduce the possibility of consumer confusion. *Id.*

35.

Dr. Bernhardt testified that advertisements can be equally misleading due to a material omission. Moreover, common sense dictates that an advertisement can be misleading if it leaves out information that is necessary for a complete and accurate assessment of the message. The State Bar has a substantial interest in reducing consumer confusion and thereby insuring the accurate flow of information. This interest is served by Standard 7(a) which provides additional information to the consumer as to the impetus of the communication, allowing the consumer to evaluate more accurately the usefulness of the particular communication in deciding whether to use the lawyer's services. *See e.g., Zauderer*, 471 U.S. at 652, 105 S. Ct. at 2282 (finding advertising misleading which did not disclose complete information regarding legal fees). This requirement for affirmative disclosure is a reasonable means to ensure that communications regarding legal services are accurate and complete. It does not impose any undue burden on the lawyer. Standard 7(a) is an

entirely appropriate requirement. Therefore, the court finds that Standard 7(a) is not unconstitutional for any of the reasons asserted.

36.

Standard 8.

A lawyer shall not use a firm name, professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing or similar professional notice or designation that includes a statement that is false, fraudulent, deceptive or misleading. A statement or claim is false and misleading if it violates the provisions of Standard 5.

37.

Plaintiffs' claim regarding Standard 8 relates to plaintiffs' claims that Standards 5(a)(2) & (3) are unconstitutional. As previously discussed, this court found that Standard 5 was not unconstitutional. Therefore, Standard 8 is not unconstitutional for the same reasons set forth in the discussion of Standard 5.

38.

Standard 12.

A lawyer shall not solicit professional employment as a private practitioner for himself, his partner or associate through direct personal contact with a non-lawyer who has not sought his advice regarding employment of a lawyer.

39.

The State Bar asserts that it has a substantial interest in protecting the public from those aspects of solicitation that involve fraud, undue influence, intimidation and overreaching. The State Bar also asserts that it has a substantial interest in protecting the tranquility and privacy of personal injury victims and their loved ones against intrusive, unsolicited in-person contact from lawyers and the subsequent detrimental effects such conduct has on the public perception of the legal profession. *See Went-For-It*, 115 S. Ct. at 2379.

40.

The State Bar argues that this rule is justified by the holding of *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978). In *Ohralik*, the Supreme Court upheld disciplinary action against an attorney who approached a potential client in her hospital room after a serious accident. *Id.* The State Bar also points to evidence that lawyers have engaged in false, fraudulent, and misleading direct-mail solicitation to show that lawyers who are inclined to use false written communication will be just as likely to engage in direct in-person communication that is false or misleading. The defendant asserts that the risk of overreaching or fraud is high with direct in-person solicitation and that such solicitation is extremely difficult to monitor. Therefore, the bar claims that an absolute ban is a necessary prophylatic rule.

41.

At trial, this court granted plaintiffs' motion for directed verdict as to Standard 12, relying principally upon *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), decided subsequent to *Ohralik*. In *Edenfield*, the court struck down a ban on in-person solicitation by certified public accountants. *Id*. The Court stated that "*Ohralik* in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S. Ct. at 1803.

42.

The Court recognizes that the interests asserted by the State Bar are substantial and important, however, the court finds that the State Bar has not demonstrated that this ban on direct in-person attorney solicitation advances its asserted interests in any direct and material way. Although the defendant's anecdotal evidence demonstrates certain harms that may be associated with in-person solicitation, the court finds that the Bar has failed to demonstrate that these harms are present in all circumstances. Furthermore, the court finds that Standard 12 is substantially broader than necessary to prevent the harms asserted by the State Bar. Therefore, Standard 12 is not a "reasonable fit" between the ends sought and the means used to obtain those ends. Accordingly, Standard 12 is unconstitutional. The State Bar is hereby enjoined from enforcing Standard 12 and from disciplining any member of the State Bar of Georgia for soliciting and

encouraging the institution of a judicial or administrative proceeding, or offering assistance therein, before being consulted by a complainant in relation thereto.

43.

Standard 13.

(b) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client; except that he may pay for public communications permitted by Standard 5 and the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service.

44.

The State Bar asserts that Standard 13(b) serves to promote the state's interest in ensuring the independence of lawyers by minimizing the number of situations in which lawyers will be motivated by economic interest incentives rather than by their client's best interest. The conduct prohibited under Standard 13(b) is a form of fee-sharing. Through this standard, the Bar seeks to eliminate the potential for conflicts of interest between lawyer and

client by specifying and regulating a particular type of relationship where such a conflict is likely to arise.

45.

Falanga and Chalker testified that 25% of their practice consisted of referrals from chiropractors with whom they have previously made contact, either directly or indirectly. Part of Falanga's "marketing plan" consisted of networking with the chiropractors. Falanga would meet with the doctors to tell them about his firm, occasionally taking them to lunch, and ask them to recommend his firm to their patients. Falanga also hired persons to meet with the chiropractors and other health professionals. This "public relations" person would meet with the chiropractors to inquire as to whether they were satisfied with the attorneys' work. Falanga testified that he would make sure that the doctor was happy with the way his firm handles the cases that had been referred. Falanga recognized that part of "making the doctor happy" included ensuring that the doctor was paid for the services rendered to the patient who had been referred. Often, the only payment a chiropractor receives for the treatment of a patient (who is also the client to Falanga) is paid from any settlement for medical bills reached by Falanga. While Falanga did not pay the doctors for referrals, he would provide them with free legal advice regarding various matters, including assistance in collecting from insurers.

46.

Plaintiffs also presented testimony from two chiropractors regarding these referral arrangements. Both acknowledged that their bills for services have been challenged as excessive by insurance companies in the past. On some occasions, the insurance companies have refused to pay the bill or have negotiated with the doctor to reduce the bill. The Bar asserts that the conflict of interest arises because, in those instances where a chiropractor's bill is to be paid out of settlement proceeds, an attorney who has benefited from the doctor's referral may be less inclined to scrutinize the doctor's bill for fear of alienating him and losing his referrals. An attorney dependent on the chiropractor's referrals for a substantial portion of his business is likely to have a conflict between his client's best interests and the continued relationship with the doctor.

47.

The restrictions in Standard 13(b) serve to advance the State's substantial interest in promoting the independent judgment of lawyers and prohibiting the practice of law by a layman. *See Lawline v. American Bar Ass'n*, 738 F. Supp. 288, 296 (1990) ("prohibitons on aiding nonlawyers in the unauthorized practice of law and on forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law do not violate any First Amendment guarantees."), *aff'd*, 956 F.2d 1378 (7th Cir. 1992). The court finds that there is an inherent risk for conflict of interest under circumstances such as those described above and that Standard 13(b)

bears a direct relationship on preventing such conflict from arising.

48.

The State Bar also asserts an interest in protecting consumers from overreaching by those to be compensated. *See Ohralik*, 436 U.S. at 464, 98 S. Ct. at 1923, n. 22. Smith testified that the State Bar has received regular complaints regarding aggressive advertising and solicitation methods of attorneys. In particular, Smith cited the use of "runners" to acquire personal injury clients. "Runners" are individuals who are paid for referring potential clients. These runners, who are motivated by personal financial gain, have every incentive to make misrepresentations to the potential client in order to gain the client's business for the attorney and, thus, keep the attorney happy and willing to pay the runner. Smith testified that the bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. The court finds that prohibiting lawyers from engaging in the practice of paying for referrals is a reasonable method of preventing the harm caused by the overreaching of certain runners, which has prompted complaints to the Bar by the public. In light of the foregoing, the court finds that Standard 13(b) is not unconstitutional for the reasons asserted.

49.

Standard 16.

A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct

by any person or organization prohibited under Standards 12, 13, 14, or 15.

50.

Plaintiffs have not challenged the prohibitions contained in Standards 14 and 15, therefore, the plaintiffs have not challenged the constitutionality of Standard 16 as it relates to Standards 14 and 15. Standard 16's prohibition in relation to the prohibitions contained in Standard 13 is not unconstitutional for the reasons set forth in the discussion of Standard 13(b). Standard 16 is unconstitutional only to the extent that it seeks to prohibit in-person solicitation, for reasons discussed under Standard 12.

49.

Standard 17.

A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except: (a) A lawyer may accept employment from a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

52.

Standard 17(a) is unconstitutional for the reasons set forth in the court's discussion of Standard 12. Accordingly, defendant is enjoined from enforcing Standard 17(a) and prosecuting a grievance against an attorney for

accepting employment from a layperson to whom he has given unsolicited legal advice or to whom he has recommended the taking of legal action.

53.

Standard 18.

A lawyer may communicate the fact that the lawyer does or does not practice in a particular field of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; (b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty," or a substantially similar designation; and

(c) A lawyer who has been certified as a specialist in a particular field of law or law practice as a result of having successfully completed a program of legal specialization approved by the State Disciplinary Board of the State Bar of Georgia may publicly communicate the fact that he has satisfied the requirements of that particular program.

54.

The State Bar claims a substantial interest in protecting consumers from misleading attorney advertising. The

State Bar contends a substantial risk exists that consumers are likely to infer that the term "specialist" connotes that an attorney's qualifications in a particular area of practice exceed the general qualifications for admission to the State Bar. Plaintiffs respond that their potential clients frequently inquire as to whether they "specialize" in a particular area of law and therefore could not be misled by the use of the word "specialist." However, plaintiffs' evidence does not distinguish between those clients who are seeking information as to the special training a lawyer has had in a particular area of law (much as a medical doctor who receives additional training in a particular system of the body may be a "specialist") and those clients who simply want to know if the lawyer practices in a particular area of law (although no special training is required by the Bar to so limit his practice). Defendant presented evidence, through the Georgia Survey, which demonstrates that there is considerable miscomprehension by consumers with respect to lawyer advertising. The results of the survey indicate that those most likely to use legal advertising for selecting an attorney frequently have little or no experience with lawyers or the legal system. These same individuals experienced higher levels of miscomprehension with respect to the content of legal advertising. The court finds that the defendants have demonstrated a substantial likelihood that the use of the word "specialist" could be misleading to consumers and that Standard 18 is a reasonable means for regulating its use to reduce or eliminate consumer confusion.

55.

The Supreme Court has held that a State Bar cannot categorically ban a lawyer's ability to advertise his certification as a specialist. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110-112, 110 S. Ct. 2281, 2291-93. However, "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of the specialty." *Id.* at 110, 110 S. Ct. at 2292.

56.

Standard 18 is not an absolute ban prohibiting lawyers from listing their areas of practice in advertisements. However, a lawyer who wishes to hold himself out as a "specialist" (in other than the areas of patent and admiralty) must show that he has "successfully completed a program of legal specialization approved by the State Disciplinary Board." The saving feature of Standard 18 is subsection(c), particularly in light of the bar's representation that it would entertain additional categories of "specialist" at the request of a particular practice group or area of law, and in the absence of a showing by plaintiffs that the State Bar has acted in an unreasonably restrictive manner in designating new specialties. Therefore, Standard 18 is not unconstitutional for any of the reasons asserted by plaintiffs.

Statutes

57.

Plaintiffs also challenge the constitutionality of several statutes enacted by the Georgia Legislature. Defendant asserts that it cannot enforce the challenged sections of the Official Code of Georgia, by virtue of the creation of the unified Bar in 1963 and, therefore, it is not a proper party as to plaintiffs' challenge to the statutes. The court agrees that it is questionable as to whether the State Bar has the authority and/or is the proper party to resist a constitutional attack on a state statute. However, in this case, it is not necessary for the court to resolve the issue of the constitutionality of the enforcement of the state statutes inasmuch as the State Bar has conceded that they have not, do not, and will not enforce the statutes in question. *See Attwell v. Nichols*, 466 F. Supp. 206, 209 (N.D. Ga. 1979) (power over State Bar is judicial not legislative), *aff'd*, 608 F.2d 228 (5th Cir. 1979); *Carpenter v. State*, 250 Ga. 177 (1982) ("Matters relating to the practice of law, including the admission of practitioners, their discipline, suspension and removal, are within the inherent and exclusive power of the Supreme Court of Georgia.") Accordingly, plaintiffs' constitutional challenges asserted against the state statutes are DISMISSED against the State Bar.

Vagueness Challenge

58.

Plaintiffs contend that all of the challenged Standards of Conduct are unconstitutionally vague. In order to

show that a regulation is facially invalid, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 1193 (1982). In other words, the plaintiffs must establish that the Standards are " 'so vague and indefinite as really to be no rule or standard at all.' " *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F. 2d 1030, 1036 (11th Cir. 1992) (quoting *Boutilier v. INS*, 387 U.S. 118, 123, 87 S. Ct. 1563, 1566 (1967)). The test to determine if regulatory prohibitions are unconstitutionally vague is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579, 93 S. Ct. 2880, 2897 (1973). Guidance on the issue can be gained by considering the particular context in which a regulation has been promulgated. *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988). In *Howell*, the court denied a vagueness challenge to a state bar rule prohibiting lawyers from "engaging in conduct that is prejudicial to the administration of justice," finding that lawyers have the benefit of guidance provided by case law, court rules and the lore of the profession to assist them in understanding the application of the rule. *Id.*

59.

Likewise, lawyers in the State of Georgia have these same tools available to assist them in interpreting and applying the challenged Standards of Conduct. Furthermore, the State Bar provides guidance to attorneys who

are unsure as to whether particular conduct falls within the scope of a standard's prohibitions. Attorneys may seek formal or informal advisory opinions regarding specific issues. Considering the challenged standards of conduct and the context within which they were promulgated, this court finds that the standards are not unconstitutionally vague.

Equal Protection Challenge

60.

Plaintiffs claim that certain standards of conduct are violative of "equal protection" as a component of Fourteenth Amendment protection. Specifically, plaintiffs contend that the State Bar routinely enforces certain standards of conduct against Plaintiff attorneys while failing to prosecute Defense attorneys for similar violations. Plaintiffs presented no evidence demonstrating that the State Bar refused to prosecute an attorney in the Defense Bar after a grievance had been filed against him, while pursuing the same type of prosecution against a member of the Plaintiff Bar. The General Counsel of the State Bar of Georgia has assured the court that the State Bar had and would prosecute attorney misconduct equally, without regard to whether the attorney is primarily a member of the Defense Bar or the Plaintiff Bar. Furthermore, within the context of commercial speech, if there is a sufficient "fit" between the defendant's means and ends to satisfy the concerns of the First Amendment, the same fit is adequate under the applicable rational basis equal

protection analysis. *Don's Porta Signs, Inc. v. City of Clearwater,* 829 F. 2d 1051, 1054, n. 10 (11th Cir. 1987) (holding that because regulation passes muster under the *Central Hudson* test, plaintiff's claim based on equal protection must fail). Accordingly, plaintiffs' equal protection challenge to the remaining standards fails.

Procedural Due Process Challenge

61.

Procedural Rules of the Investigative Panel: Rule 18 – Extension of Time Within Which a Formal Complaint May be Filed:

The Chairperson or chair-designee may extend the time within which the Investigative Panel may file its formal complaint with the State Supreme Court for good cause shown.

62.

Plaintiffs challenge Rule 18 of the internal rules of the State Bar's Investigative Panel as a violation of their procedural due process rights. Specifically, plaintiffs claim that Rule 18's provision for granting the Investigative Panel an "indefinite extension" in which to file a formal complaint prejudices a respondent attorney because there is no specific time limit for the extensions.

63.

The Investigative Panel cannot consider probable cause for the violation of a standard of conduct unless the

attorney has been notified of the alleged violation and has had the opportunity to respond. *See* Rule 4-201.1. Smith testified that, at the time an extension is issued to the Investigative Panel, the attorney is aware of the alleged violations and the facts supporting the charged violations through the "Notice of Grievance." The attorney also has been notified as to which Investigative Panel Member has been assigned his case. Smith also testified that the attorney may contact the Investigative Panel Member or the Office of General Counsel at any time to learn of witnesses, evidence and the status of the matter. Because the applicable discovery rules are the same as those in civil cases in the State of Georgia, attorneys are able to obtain and preserve evidence during the extension.

64.

Furthermore, an attorney who feels that the extension rule has been unconstitutionally applied may raise a procedural due process challenge in the course of the disciplinary proceeding. *See Cohran v. State Bar of Georgia,* 790 F. Supp. 1568, 1571 (1992). Any delay in the disciplinary proceedings may be considered as a mitigating factor when making a final determination of the alleged violations.

65.

In order to justify relief for a procedural due process violation in an administrative proceeding, there must be a showing of substantial prejudice. *United States v. Lober,* 630 F.2d 335, 336 (5th Cir. 1980). Plaintiffs have presented

no authority to support the proposition that even a three year extension for the filing of the formal complaint presents undue delay constituting a per se violation. *See United States v. Medina-Arellano*, 569 F.2d 349, 352 (5th Cir. 1978) (holding that four year delay before indictment or arraignment in criminal case did not violate due process absent showing of prejudice by defendant). There has not been a sufficient showing of prejudice to support a holding that Rule 18 allows for impermissible delay. Therefore the court finds that respondent attorneys have an adequate opportunity to respond and defend against allegations of violations of the standards of conduct. Accordingly, Investigative Panel Rule 18 is not unconstitutional for the reasons asserted.

66.

On July 12, 1996, defendant filed a motion to re-open the trial record in this case. The trial of this case ended on May 10, 1996. Defendant has not demonstrated a sufficient reason to re-open the trial record and allow this matter to become a continuing, unlimited endeavor. Accordingly, Defendant's motion to re-open the trial record [docket no. 37] is DENIED.

Summary

The court finds in favor of the Defendant with regard to plaintiffs' constitutional challenges related to Standards 5(a)(2) & (3); 6(b); 7(a), 8, 13(b), 16 (except as it relates to Standard 12) and 18, and Disciplinary Rule 18. Plaintiffs' claims with regard to Standards 5(a)(4); 6(d)(4) and 13(a) are DISMISSED without prejudice. Standards

12, 16 (but only as it relates to Standard 12) & 17(a) are unconstitutional under the First Amendment. Defendant is hereby enjoined from enforcing these standards and from disciplining any member of the State Bar of Georgia for soliciting and encouraging the institution of a judicial or administrative proceeding, or offering assistance therein, before being consulted by a complainant in relation thereto. Defendant's motion to reopen the trial record in this case [docket no. 37] is DENIED.

SO ORDERED, this 18 day of July, 1996.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
MAR 22 1999
OFFICE OF THE CLERK

No. 98-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT FALANGA and RONALD CHALKER,

Petitioners,

v.

STATE BAR OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

Whether a state bar rule prohibiting lawyers from paying for referrals directly and materially advances the State's substantial interest in ensuring the independent judgment of lawyers and eliminating the potential for conflicts of interest between lawyer and client such that there is a reasonable fit between the ends sought by the State Bar and the means chosen to obtain those ends.

II

Whether state bar rules that prohibit uninvited in-person solicitation by lawyers or a lawyer's agents or runners, as applied to circumstances involving a lawyer's uninvited in-person solicitation of unsophisticated, injured or distressed lay persons, directly and materially advances the State's substantial interest in (1) protecting the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct and (2) protecting the tranquility and privacy of personal injury victims and their loved ones against intrusive, unsolicited in-person contact from lawyers and the subsequent detrimental effects such conduct has on the public perception of the legal profession, such that there is a reasonable fit between the ends sought by the State Bar and the means chosen to obtain those ends.

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STATEMENT OF THE CASE

A. Introduction

The petition filed by Mr. Falanga mischaracterizes the issues presented to the trial court and the Eleventh Circuit. Having lost in the Eleventh Circuit, petitioners now contend that the in-person solicitation they seek merely involves (1) networking with business professionals and community leaders and (2) "occasionally" having nonlawyer employees contact potential clients by telephone. In fact, what petitioners actually want to do is best reflected in the trial testimony of Mr. Falanga and two chiropractors, discussed more fully below. It is noteworthy that after considering such evidence, the Eleventh Circuit stated, "[u]nlike the CPA in *Edenfield*, Falanga and Chalker do not contact 'prospective business clients.' " (Eleventh Circuit Opinion, Petition Appendix 1, at App. 17, *citing Edenfield v. Fane*, 507 U.S. 761 (1993)) Comparing the facts in this case to the facts in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Circuit Court stated

> the essential circumstances of *Ohralik* were that a lawyer engaged in 'uninvited' in-person solicitation of 'unsophisticated, injured, or distressed lay person[s].' *Edenfield*, 507 U.S. 774-75 (*quoting Ohralik*, 436 U.S. at 465-66). **To be sure, Falanga's and Chalker's circumstances fall squarely within this category of 'ambulance chasing.'**

(Eleventh Circuit Opinion, at App. 18) (emphasis added). The Eleventh Circuit found that the present case is closer to *Ohralik* than *Edenfield* and held that the challenged regulations governing uninvited in-person solicitation by lawyers are constitutional as applied to the "identity of the parties and the precise circumstances of the solicitation" at issue in this case.

Petitioners seek to avoid the accurate and appropriate decision by the Eleventh Circuit by recasting the type of solicitation they

desire and by attempting to resurrect a claim regarding restrictions on telephonic solicitation, which they abandoned at trial. This case does *not* involve personal solicitation by lawyers in a business context. Further, the Eleventh Circuit properly declined to decide the issue of "whether Georgia's restriction on telephonic solicitation violates Falanga's . . . commercial speech rights" because petitioners abandoned this claim at trial and the district court made no ruling on this matter. (Eleventh Circuit Opinion, at App. 18, n.26). Having abandoned this claim at trial, petitioners should not be permitted to raise this issue in their petition to this Court.

B. The Proceedings Below

The State Bar of Georgia ("State Bar"), respondent and defendant in the case below, is an administrative arm of the Supreme Court of Georgia. The State Bar is authorized by the Supreme Court of Georgia to investigate, discipline and make recommendations to the Supreme Court regarding discipline of members of the State Bar, and those licensed to practice law in Georgia, for violations of the Standards of Conduct set forth in Bar Rule 4-102. (R3-40-1) In June 1992, after receiving a sworn grievance from a chiropractor, the State Bar of Georgia began investigating Falanga and Chalker for breaches of several professional conduct standards. In an effort to stop the disciplinary proceedings, Falanga and Chalker filed a complaint in the United States District Court for the Northern District of Georgia. Falanga and Chalker alleged, among other things, that enforcement of these standards would violate their commercial speech rights under the First Amendment, as incorporated through the Fourteenth Amendment. After conducting a non-jury trial, the district court sustained as constitutional all but the restrictions on lawyers' in-person, uninvited solicitation, Standards 12, 16 (only as it refers to 12) and 17(a). Relying primarily upon the case of *Edenfield v. Fane*, 507 U.S. 761 (1993), the district court held that these three standards were unconstitutional and enjoined the State Bar from enforcing them against any lawyer.

Both parties appealed the district court's decision to the Eleventh Circuit. On August 19, 1998, the Eleventh Circuit entered an opinion declaring all of the challenged State Bar Rules constitutional. Petitioners filed a Suggestion of Rehearing En Banc, which was denied on November 18, 1998. This Petition for Writ of Certiorari was docketed with this Court on February 18, 1999. Petitioners challenge only the Circuit Court's finding that Standards 12, 13(b), 16 (but only as it relates to 12 and 13) and 17(a) are constitutional. Essentially, these standards prohibit lawyers from paying for referrals (a form of fee sharing) and prohibit uninvited in-personal solicitation by lawyers or by a lawyer's runners or agents.

STATEMENT OF FACTS

At the trial of this case, the State Bar presented extensive evidence from several sources to substantiate the Bar's contention that the harms targeted by the challenged regulations are real and that the regulations are reasonably tailored to the Bar's stated objectives. Those sources included: (1) William P. Smith, III, General Counsel for the State Bar of Georgia; (2) an independently-conducted study entitled "Consumer Reactions to Legal Services Advertising In The State of Georgia ("Georgia Survey"); (3) Dr. Kenneth Bernhardt, an expert in marketing and co-author of the Georgia Survey; (4) Jeffrey R. Davis, Assistant General Counsel; and (5) Karen Sturniolo, a recipient of lawyer advertising. Additionally, the testimony of Robert Falanga, petitioner and plaintiff in the case below, along with the testimony of two chiropractors who referred business to Mr. Falanga, provide substantial evidence that supports the State Bar's case.

A. Testimony of Robert Falanga and Two Chiropractors

Robert Falanga testified about the nature of his practice, his marketing plan and the general economic and educational background of his clients. Since 1984, Falanga's law practice has primarily focused upon representing plaintiffs in personal injury cases. (R7-489) Falanga described his clientele as generally poor

and uneducated. (R7-497) About eighty percent of his cases involve personal injuries due to automobile accidents. (R7-497)

Falanga and Chalker serve as the only lawyers in their five-office law firm headquartered in Atlanta, Georgia. (R7-497) Falanga and Chalker retain new clients through in-person, telephone and direct mail solicitation. (R7-498) (Eleventh Circuit Opinion, at App. 2) According to Falanga, he obtains the names and addresses of potential clients by copying police reports of automobile accidents that are maintained at the Department of Public Safety. (R7-499) Falanga testified that he sends out approximately 300 letters a week, and that this method of marketing generates about 8 to 12 new cases on a weekly basis. (R7-500)

Mr. Falanga testified that approximately twenty-five percent of his clients were referred to him by chiropractors. (R5-500, 501) According to Falanga, these chiropractors typically refer their patients to more than one attorney. (R5-502) Falanga testified that as part of his "marketing plan" he would "network" with chiropractors. (R5-501, 502) Although Falanga denied "paying" these doctors for referrals, he testified that he would provide them with free legal advice regarding various matters. (R5-501, 502; 521) Falanga would ask the chiropractor to refer potential clients to him and Falanga would agree to refer his clients to the chiropractor. (R6-549) In order to keep the flow of referrals coming, Falanga testified that he would make sure that the doctor was happy with how his firm was handling the cases that had been referred. (R5-502) Falanga recognized that part of "making the doctor happy" included ensuring that the doctor was paid for the services rendered to the patient who had been referred. (District Court Order ("Order"), Supplemental Appendix, p. 23, at ¶ 45) Often the only payment a chiropractor receives for the treatment of a patient (who is also the client to Falanga) is paid from any settlement for medical bills reached by Falanga. *Id.*

Two chiropractors testified for the plaintiffs about this practice from the doctor's perspective. Both chiropractors testified that

they referred patients to Falanga (R6-549, 559) The chiropractors admitted that their bills had been challenged on occasion as excessive by insurance companies. (R6-551, 552) In some cases, the insurance company refused to pay for the charges or negotiated with the doctor to reduce the charges. (R6-552) Falanga provided advice or assistance to chiropractors when they encountered problems getting paid by insurance companies. (R5-521)

B. Evidence Presented by the State Bar

The State Bar's general counsel, William Smith, testified that Standard 13(b), which prohibits lawyers from paying for referrals, serves to promote the State's interest in assuring the independence of lawyers by minimizing the number of situations in which lawyers will be motivated by economic interest incentives rather than by their client's best interest. (R8-664) The conduct prohibited under Standard 13(b) is a form of fee sharing. Mr. Smith testified about the practice of using "runners" to acquire personal injury clients. These "runners" are individuals who are paid for referring potential clients. Mr. Smith testified that during the twelve year period that he has been General Counsel, he is aware of consumer complaints regarding the aggressive tactics of runners. (R9-690) Smith explained that runners, motivated by personal financial gain, have every incentive to make misrepresentations to the potential client. (R8-663, 664) The Bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. Thus, the only way to protect the public from the overreaching of these runners is to prohibit attorneys from engaging in the practice of paying for referrals. (Order, Supp. App., p. 25, ¶ 48)

Additionally, the State Bar's general counsel and assistant general counsel provided anecdotal evidence relaying the public's complaints about in-person, telephonic and direct mail solicitation. (Eleventh Circuit Opinion, at App. 19) The State Bar's general counsel, William P. Smith, III testified that based upon his experiences during the twelve years he has served as General Counsel, members of the public voiced dissatisfaction with

uninvited in-person solicitation because such conduct takes on the aura of an imperative. (R6-158) When an individual is contacted directly by a lawyer, there is an implication that the reason for the contact has something to do with the law, and the individual may feel that she has to speak with the lawyer in order to determine the purpose of the communication. (R6-169) An accident victim herself testified about the intrusive nature of solicitation that Falanga himself initiated. (Eleventh Circuit Opinion, at App. 19)

The State Bar presented the results of an independently-conducted study by Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt, entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia (Defendant's exhibit 7, hereinafter "Georgia Survey") Dr. Kenneth Bernhardt, Chairman of the Department of Marketing at Georgia State University, testified for the State Bar. According to Dr. Bernhardt, the results of the Georgia Survey demonstrate that, while consumers generally favor legal advertising, the more intrusive the advertising method used, the more negative the attitude towards attorneys who advertise in that medium. (R3-40-7; R6-263)

The Georgia Survey demonstrates that unsophisticated, less educated and poorer consumers are more susceptible to overreaching and undue influence in circumstances involving personal solicitation by lawyers. (Georgia Survey, p. 29) The Georgia Survey also established that less educated consumers, as well as consumers with little personal knowledge of lawyers, are more susceptible to misunderstanding communications about legal services. (Georgia Survey, pp. 172, 176) Significantly, the Georgia Survey demonstrates that these same consumers are more likely to *rely* upon lawyer advertising for the selection of a lawyer. (Georgia Survey, p. 56)

The results of the survey show that about half of the respondents agreed that "Lawyers track down injured people and try to talk them into taking legal action." (Georgia Survey, p. 28)

With respect to the attorney selection process, "referral" was the dominant method used by respondents in selecting or learning about their most recently used attorney. (Georgia Survey, p. 56) Those most likely to consider mass media advertising as important in selecting an attorney were aged 18-24 with high school education or less, incomes under $15,000 and with little knowledge of attorneys or the legal system. (Georgia Survey, p. 56; *see also* Order, Supp. App., p. 9 at ¶ 15)

REASONS FOR DENYING THE WRIT

The petition's largely unsupported factual allegations regarding the circumstances of solicitation at issue in this case mischaracterize the issues presented to the trial court and the Eleventh Circuit and do not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

I.

THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE RESTRICTIONS IN STANDARD 13(b) SERVE TO ADVANCE THE STATE'S SUBSTANTIAL INTEREST IN PROMOTING THE INDEPENDENT JUDGEMENT OF LAWYERS AND PROHIBITING THE PRACTICE OF LAW BY A LAYMAN.

Standard 13(b) prohibits lawyers from paying for referrals. The conduct prohibited under Standard 13(b) is a form of fee sharing. Because this standard prohibits conduct ("a lawyer shall not compensate"), this regulation does not fall within the framework of commercial speech. Even if this standard is considered to be a regulation of commercial speech, however, the State Bar provided sufficient evidence to justify this regulation. Mr. Smith testified that Standard 13(b) serves to advance the State's substantial interest in promoting the independent judgment of lawyers and prohibiting the practice of law by a layman. (R8-664) *See also* ABA Code of Professional Responsibility, EC 3-3

("Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman".) *See, e.g., Lawline v. American Bar Ass'n*, 738 F. Supp. 288 (1990), *aff'd*, 956 F.2d 1378 (1992), *cert. denied*, 114 S. Ct. 551 (1993) ("prohibitions on aiding nonlawyers in the unauthorized practice of law and on forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law do not violate any First Amendment guarantees.")

The State Bar presented evidence regarding the use of "runners" to acquire personal injury clients. (R9-690) The district court noted that " '[r]unners' are individuals who are paid for referring potential clients. These runners, who are motivated by personal financial gain, have every incentive to make misrepresentations to the potential client in order to gain the client's business for the attorney, and thus, keep the attorney happy and willing to pay the runner." (Order, Supp. App., p. 25, ¶ 48) The State Bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. Thus, the only way to protect the public from the overreaching of these runners is to prohibit attorneys from engaging in the practice of paying for referrals. The district court noted that

> prohibiting lawyers from engaging in the practice of paying for referrals is a reasonable method of preventing the harm caused by the overreaching of certain runners, which has prompted complaints to the Bar by the public.

(Order, Supp. App., p. 25, ¶ 48)

Contrary to assertions in the petition, Mr. Falanga's relationship with referring chiropractors was not limited to "networking" with doctors and providing information regarding his background and law practice. Although Mr. Falanga denied "paying" chiropractors for referrals, he testified that he would provide them with free legal advice if the referring doctor

encountered any problems with getting paid by the insurance company. (R7-501, 502) Two chiropractors testified that their bills for medical care had been challenged on occasion as excessive by insurance companies. (R7-551, 552) In some cases, the insurance company refused to pay for the charges or negotiated with the doctor to reduce the charges. (R7-551, 552)

Common sense dictates that in cases where a chiropractor's bill is to be paid out of settlement proceeds, an attorney who has benefitted from the doctor's referrals, may not be motivated to scrutinize the doctor's bill. (Order, Supp. App., p. 24, ¶¶ 47-48) An attorney, dependent upon chiropractors' referrals for a substantial portion of his practice, clearly has a conflict between his client's best interest and his own in continuing his relationship with the doctors. As Mr. Falanga testified, the attorney is well aware that the chiropractor can refer patients to other attorneys should the chiropractor become unhappy with the attorney's handling of the matter.

II.

THE ELEVENTH CIRCUIT CORRECTLY HELD THAT RULES BANNING UNINVITED IN-PERSON SOLICITATION BY LAWYERS ARE CONSTITUTIONAL

The Eleventh Circuit correctly upheld the challenged rules restricting uninvited in-person solicitation by lawyers and lawyers' agents and runners (Standards 12, 16 and 17(a)). The circuit court held that the State Bar was justified in relying on the Court's findings of fact and conclusions of law in *Ohralik v. Ohio State Bar Association*, "because for all intents and purposes this case is *Ohralik*." (Eleventh Circuit Opinion, at App. 19) The circuit court further found that the challenged rules are constitutional under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

In reversing the district court's decision that three of the Standards were unconstitutional, the Eleventh Circuit noted that

the district court had improperly charged the State Bar with the wrong burden of proof. The district court found that the challenged regulations failed because "the Bar . . . failed to demonstrate that [the harms associated with in-person solicitation] are present in *all* circumstances." The Eleventh Circuit noted that

> [i]n an as-applied challenge, however, the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation.

(Eleventh Circuit Opinion, at App. 27, n.24, *citing*, *Edenfield v. Fane*, 507 U.S. 761, 774 (1993))

A. The State Bar established that under the circumstances in the present case, as in *Ohralik*, the challenged regulations are justified

Under *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, the State Bar is *not* required to show in every instance of personal solicitation that the solicited individual will be harmed. Rather, the State Bar must demonstrate that, in light of the general circumstances presented in the case, the Bar's perception of the potential for harm is well founded. *Ohralik*, 436 U.S. at 464.

In *Ohralik*, the prophylactic ban on uninvited in-person solicitation by lawyers was deemed constitutional under the general circumstances presented in the case. The *Ohralik* Court reasoned that an "unsophisticated, injured, or distressed lay person may place his trust with a lawyer . . . simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Id.* at 465. Additionally, the *Ohralik* Court recognized that generally, lay persons are unfamiliar with the law, with how legal services are procured, and with the typical arrangements between lawyer and client. *Id.* at 465, n.24. The court found such circumstances "inherently conducive to overreaching and other forms of misconduct" and therefore, the "State has a strong interest in adopting and enforcing rules of conduct designed

to protect the public from harmful solicitation whom it has licensed." *Id.* at 464.

The Eleventh Circuit recognized that the identities of the parties and the circumstances of solicitation in the present case closely parallel the facts in *Ohralik*. (Eleventh Circuit Opinion, at App. 17) Petitioners are attorneys who primarily engage

> in the practice of law that involves representing clients who have personal injury claims or death claims that must be brought against others legally responsible for payment of damages for those claims.

(R1-1-2) In their complaint, petitioners asserted that they would like to have direct personal contact with potential clients who have not first approached them. They also would like to give advice to potential clients, and then be hired, even though such potential clients are *not* close friends, relatives or former clients. (R1-1-6)

Falanga testified that generally his clients are poor and uneducated. (R7-497) Falanga testified that his marketing plan includes obtaining the names and addresses of potential clients by copying police reports of automobile accidents. He uses this information to send out approximately 300 letters per week. (R7-499) Thus, the general circumstances of solicitation in the present case, involving in-person solicitation by a lawyer of potential clients who are "poor, uneducated" and have recently been involved in a trauma, such as an automobile accident, are similar to the circumstances of solicitation considered by the Court in *Ohralik*. (Eleventh Circuit Opinion, at App. 17) Rejecting petitioners' reliance on *Edenfield*, the Eleventh Circuit correctly noted:

> **[p]lainly, this case is closer to *Ohralik* than *Edenfield*.** Georgia and Ohio restrict lawyers' in-person, uninvited solicitation through substantially identical means. Falanga and Chalker, like Ohralik, practice personal injury law. All three lawyers (and/or their agents) solicit automobile accident victims face-to-face. Unlike the

> CPA in *Edenfield*, Falanga and Chalker do not contact "prospective *business* clients." 507 U.S. at 771 (emphasis added). Rather, most of their clients are poor and uneducated individuals. Thus, although Falanga's and Chalker's conduct may not be as egregious as Ohralik's, they cannot seriously contend that *Edenfield* saves their case. *See Ohralik*, 436 U.S. at 468 ("The absence of explicit proof or findings of harm or injury is immaterial.").

(Eleventh Circuit Opinion, at App. 17) (emphasis added)

B. The Eleventh Circuit correctly held that the challenged regulations passed Constitutional muster under the *Central Hudson* test

Restrictions on commercial speech are analyzed under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). Under the *Central Hudson* test, State regulation of commercial speech that is neither misleading nor connected to unlawful activity is permissible if: (1) the State asserts a substantial interest in support of its regulation; (2) the State establishes that the restriction directly and materially advances that interest; and (3) the regulation must be narrowly drawn. *Id.*, 447 U.S. at 564-65. Applying the *Central Hudson* test to the instant case, the Eleventh Circuit held that

> the State Bar presented sufficient evidence as a matter of law to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree . . . Georgia's prophylactic ban on in-person solicitation, whether the actor be a lawyer or a non-lawyer, stands in reasonable proportion to the interest served

(Eleventh Circuit Opinion, at App. 28)

The State Bar's general counsel and assistant general counsel provided anecdotal evidence, regarding the public's complaints about in-person, telephonic and direct mail solicitation. (Eleventh Circuit Opinion, at App. 28) Additionally, the State Bar presented the testimony of an accident victim who testified about the intrusive nature of solicitation that Falanga had initiated. (Eleventh Circuit Opinion, at App. 19)

The State Bar presented evidence of an independently-conducted study entitled "Consumer Reactions to Legal Services Advertising in the State of Georgia." While the study focused on television advertising, both the district court and the circuit court found that some of the study's conclusions are relevant to in-person solicitation. (Eleventh Circuit Opinion, at App. 19-20)

The Eleventh Circuit recognized that the Georgia Survey "posits that the more intrusive the advertising method, the more negative the public's view of lawyers." (Eleventh Circuit Opinion, at App. 20) The circuit court further noted that the Georgia Survey demonstrated that "[o]verall, the highest percentage of respondents agreed with the proposition that 'lawyers track down injured people and try to talk them into taking legal action.' " (Eleventh Circuit Opinion, at App. 20) The Circuit Court found it significant that the study showed that consumers "[o]verwhelmingly prefer to choose a lawyer through methods that they control, that is references from family, friends, co-workers, etc." (Eleventh Circuit Opinion, at App. 20) Thus, the Circuit Court correctly found that

> [f]rom this information, the State Bar could reasonably infer that the majority of legal service consumers view in-person solicitation — whether through lawyers or their agents — as unduly intrusive, destructive to the court system and deserving of regulation.

Id.

The Georgia Survey demonstrates that unsophisticated, less educated and poorer consumers are more susceptible to

overreaching and undue influence in circumstances involving personal solicitation by lawyers. (Georgia Survey, p. 29) The Georgia Survey also established that less educated consumers, as well as consumers with little personal knowledge of lawyers, are more susceptible to misunderstanding communications about legal services. (Georgia Survey, pp. 172, 176) Significantly, the Georgia Survey demonstrates that these same consumers are more likely to *rely* upon lawyer advertising for the selection of a lawyer. (Georgia Survey, p. 56) The Eleventh Circuit held that State Bar is *not* required to prove that every consumer will be harmed by such personal solicitation. As in *Ohralik*, under the circumstances of solicitation at issue in the present case, "**it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.**" *Edenfield*, 113 S. Ct. at 1802, *citing Ohralik*, 436 U.S. at 465-466. (emphasis added)

The Eleventh Circuit noted that history, consensus and "common sense" support the State Bar's position. (Eleventh Circuit Opinion, at App. pp. 20-27) The Circuit Court correctly found that in addition to the anecdotal and study evidence presented by the State Bar, the long history of the regulations proscribing in-person solicitation "cuts in favor of the State Bar." *(Id.* at App. 20) Noting that "proscriptions on in-person solicitation have been a part of the State Bar's regulatory scheme since its creation in 1963," the Circuit Court rejected Mr. Falanga's argument that the State Bar's evidence lacked specificity on the extent of the harm associated with in-person solicitation. In light of the long history of the regulation, the lack of evidence regarding actual harm from in-person solicitation was not surprising. *Id.* The State Bar presented extensive evidence of the harm that would exist, but for the challenged legislation. *See Sciarrino v. City of Key West, Fla.*, 83 F.3d 364, 367 (11th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997).

The Circuit Court noted that the strong consensus amongst the states banning in-person, uninvited solicitation for pecuniary gain strongly supported the State Bar's position. "No less than 32

states proscribe in-person solicitation in the same or similar manner." (Eleventh Circuit Opinion, at App. 22) "Only four jurisdictions — the District of Columbia, Maine, Montana and North Dakota — liberally permit in-person solicitation, but not without limitation." (*Id.* at App. 24-25)

With respect to the State Bar's reliance upon "simple common sense," the Eleventh Circuit agreed that "we need go no further than the four-corners of *Ohralik*." (Eleventh Circuit Opinion, at App. 26) The Circuit Court cited *Ohralik* for the principle:

> unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.

(Eleventh Circuit Opinion, at App. 26 *citing Ohralik*, 436 U.S. at 454, 457-58 (internal citations and footnotes omitted))

C. The challenged regulations banning uninvited in-person solicitation by lawyers must be considered in light of alternate channels of communication

In *44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), this Court recognized that an important factor in the First Amendment analysis of commercial speech regulations is whether additional available channels of communication exist. 116 S. Ct. at 1507. Accordingly, the commercial speech regulations at issue in the present case, must be considered in light of the "channels of communication open to" Georgia lawyers. Georgia lawyers are

permitted to advertise on prime-time television and radio, in newspapers, on billboards, in the Yellow Pages and other media.

Furthermore, the challenged regulations do not create an absolute ban on lawyer in-person solicitation. Nothing in the rules prohibit an attorney from sending potential clients written communications inviting the potential client to contact the lawyer if the individual would be interested in a personal presentation. (Eleventh Circuit Opinion, at App. 29)

The only circumstances of solicitation presented in this case involve lawyers' solicitation of potential clients who are generally poorer, less educated and who have recently suffered some trauma. In the case below, there was no testimony by any attorney who sought personally to solicit clients in a business context. At trial, the petitioners abandoned their claim that the regulations unconstitutionally prohibited in-person telephone solicitation of potential clients and the Eleventh Circuit declined to consider this issue on appeal. Thus, there is no basis for this Court to conclude that the challenged regulations, which permit invited personal solicitation, are overly broad.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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